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MANUAL OF EVIDENCE

IN CIVIL CASES.

BY

R. E. KINGSFORD, M.A., LL.B.,

Lecturer on Commercial Law, Contracts and Evidence to the Law Society of Upper Canada.

ASSISTED BY

J. E. HANSFORD,

Of Osgoode Hall, Barrister-at-Law.

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PREFACE.

The Manual now published is founded on lectures delivered by me as Lecturer on Evidence for the Law Society of Upper Canada. Some of those who attended represented that they would be glad to have these Lectures in permanent form. They stated that other students, who had not been able to attend, would also be likely to derive benefit from the publication. Two of those who did attend, Messrs. Hansford and Mussen, undertook to make all necessary arrangements and to do the work of proof-reading, etc. I agreed to put the MS. in as good form as my other employments would permit, and the present Manual is the result. It does not pretend to be anything more than an attempt to answer the question, *What must I prove?* I know of no work which solves this difficulty for beginners. Roscoe is too minute, and his book is intended for work on Circuit or at the Sittings. I have extracted from him and other authorities such general principles as seemed to me material, and have illustrated these selections by

reference to Canadian cases wherever the citation seemed apposite.

I have added, as an appendix, the new Supreme Court Rules relating to evidence, and also the Evidence Act, as contained in the Revised Statutes of Ontario, 1887.

I hope the Manual will be found useful not only to students, but also to members of the profession. It will be more than gratifying to me if it justifies the expectations of the students who thought the lectures deserving of reproduction.

My thanks are due to Messrs. Hansford and Mussen, to whom it is really owing that the lectures have been put into their present shape. Mr. Hansford's services have been particularly valuable.

R. E. KINGSFORD.

34 Murray Street,
Toronto, January, 1889.

TABLE OF CONTENTS.

PAGE

TABLE OF CASES ix
ABBREVIATIONS xiv
INTRODUCTORY 1

PART I.

ACTIONS ON SIMPLE CONTRACTS 6
Sale of Real Property 7
Vendor against Vendee 7
Vendee against Vendor 13
Use and Occupation 15
Waste, Bad Husbandry, etc 19
Bills of Exchange, Cheques, and Promissory Notes 22
Payee v. Maker of Note or Acceptor of Bill 22
Indorsee v. Maker or Acceptor 24
Drawer v. Acceptor 25
Payee or Indorsee v. Drawer 26
Indorsee v. Indorser 27
Policy of Insurance 28
Marine Insurance 28
Life Insurance 34
Fire Insurance 34
Contract of Affreightment 35
Shipowner v. Charterer or Merchant 36
Merchant v. Master or Shipowner 37
Guarantee 39
Warranty 41
Warranty on Sale of Chattels 41
Promise of Marriage 45
Award 47
Solicitor's Bill 49
Against Solicitor for Negligence 50
By Medical Practitioners 51

ACTIONS ON SIMPLE CONTRACTS—*(Continued)*. PAGE
For Wages and Wrongful Dismissal ... 52
Not Accepting Goods ... 53
Not Delivering Goods ... 56
Goods Sold and Delivered ... 57
Work and Materials ... 62
Money Paid ... 65
Money Lent ... 66
Money Had and Received ... 67
Account Stated ... 70
Against Carriers ... 70
Letter Carriers ... 74
Passenger Carriers ... 74
Passengers' Luggage—Liability Therefor of Common Carriers. 75
Against Innkeepers ... 75
Against Pawnbrokers ... 76

PART II.

DEFENCES IN ACTIONS ON SIMPLE CONTRACTS ... 77
Introductory Remarks ... 77
Accord and Satisfaction ... 79
Alteration ... 80
Fraud ... 81
Frauds, Statute of ... 81
Illegality ... 82
Infancy ... 84
Insanity ... 84
Intoxication ... 85
Limitations, Statute of ... 85
Disabilities ... 87
Subsequent Acknowledgment ... 88
Merger ... 90
Payment ... 90
Release ... 92
Rescission ... 93
Set-Off ... 94
Tender ... 96

PART III.

ACTIONS ON SPECIALTIES ... 100
On Covenants ... 100
Some of the Most Material Issues Arising in Actions on Deeds and Bonds generally ... 101
Mode of Proving a Deed ... 102

ACTIONS ON SPECIALTIES—*(Continued)*.
On Covenants—*(Continued)*. PAGE
Some of the Most Material Issues Arising in Actions on Leases or other Conveyances of Real Property 107
Where Plaintiff Sues as Assignee of Reversion 107
With the Defences of—
Assignment Over of Reversion by Plaintiff. 108
Assignment Over of Term by Defendant 109
Surrender 109
Eviction 109
Where Defendant is Sued as Assignee of the Lease, with Defences 110
Action for Rent under Indenture of Demise 111
With the Defences of—
Payment 111
Plea of Readiness to Pay on the Land 111
Statute of Limitations 111
Actions on Covenants Relating to Land 113
Not to Assign or Sublet without Leave 113
As to Trade on Premises 114
For Good Husbandry 114
To Insure 114
To Repair 115
To Pay Rates and Taxes 115
For Title 116
To Yield Up Possession of Premises at End of Term 116
For Double Value 117
For Double Rent 117
On Bond and Defences 118
For Penalty 119

PART IV.

ACTIONS ON WRONGS INDEPENDENT OF CONTRACTS 121
Nuisance 122
Negligence 126
Negligent Driving of Carriages and Railway Trains 127
Negligent Navigation of Ships 129
Negligent Keeping of Animals 129
Negligent Use of Land 130
Negligent Keeping of Fire or Inflammable Matter 130
Negligence of Railway Companies 131
Negligence of Fellow-Servants 135
Wrongful Act, Default or Neglect, Causing Death 136
Disturbance of Support of Land 138
Obstruction of Light or Air 139
Disturbance of Way 139

ACTIONS ON WRONGS INDEPENDENT OF CONTRACTS—*(Continued)*. PAGE

Disturbance of Watercourse 142
Infringement of Copyright 145
Infringement of Trade Marks 145
Infringement of Patents 147
Deceit and Misrepresentation 149
Defamation 150
Malicious Prosecution 162
Malicious Arrest 164
Wrongful Distress 165
Excessive Distress 165
Irregular Distress 167
Illegal Distress 168
Seduction 171
Assault and Battery 173
False Imprisonment 174
Trespass to Personal Property 179
Trespass to Land 180
Mesne Profits 181
Conversion of Goods 182
Detention of Goods 193
Recovery of Land 193
Replevin 200

APPENDIX.

Sections Selected from R. S. O. 1887, Cap. 61—Evidence Act 201
Rules of Supreme Court Relating to Evidence 214

TABLE OF CASES.

A

PAGE

Abernethy v. Hutchinson 145
Alderson v. Maddison 9
Aldons v. Cornwall 80
Aldridge v. Johnson 185
Allen v. Hayward 124
Allen v. Lyon 145
Allison, *re* 49
Ambrose v. Fraser 110
Anchor v. Keith 32
Anchor v. Phœnix 33
Annis v. Corbet 112
Arnold v. White 126
Atkinson v. Bell 63, 185
Attack v. Bramwell 169
Attrill v. Platt 143

B

Badgley v. Dixon 63
Bagleholc v. Walters 54
Bagueley v. Hawley 41
Bain v. Fothergill 14
Ball v. Crompton 147
Balme v. Hutton 179
Bamfield v. Massey 173
Barnett v. Earl of Guilford 180
Barr v. Gibson 42
Bateson v. Gosling 92
Battishill v. Reid 125, 138
Baxendale v. G.W.R. Co. 67
Beam v. Merner 147
Beasley v. Hamilton 137
Beavan v. McDonnell 85
Bedingfield v. Onslow 122
Bell v. Irish 167
Bennett v. Parker 99
Bensley v. Bignold 82
Berrie v. Woods 110
Betts v. De Vitre 147
Bigge v. Parkinson 43
Bishop v. Howard 17
Black v. Coleman 166
Blackburn v. Smith 14
Blake v. Midland 137
Blofield v. Payne 146
Bloxam v. Sanders 184

PAGE

Blyth v. Birmingham 127
Bottomley v. Nuttall 60
Boulton v. Blake 115
Bowen v. Owen 97
Bower v. Hill 141
Bradlaugh v. Newdegate 82
Brass v. Maitland 37
Bridge v. Gd. J. Ry. Co 128
Brittain v. Lloyd 66
Brocklebank v. Sugrue 28
Brown v. Edgington 43
Brown v. Jones 80
Brown v. McKinally 69
Bruce v. Jones 33
Brundage v. Howard 79
Brydon v. Stewart 135
Burgess v. Gray 124
Burn v. Miller 63
Burroughes v. Bayne 189
Burrowes v. Cairns 22
Burrows v. Gates 17
Burrows v. Leavens 81
Byrne v. Boadle 131

C

Calder v. Dobel 60
Caldwell v. Stadacona 34
Cameron v. Cameron 81
Cameron v. Carter 12
Cameron v. Spiking 8
Campbell v. McKerricher 9, 64
Campbell v. Shields 22
Canada Pub. Co. v. Gage 145
Cannan v. Wood 92
Capper, *Ex pte* 15
Car v. King 61
Carter v. Grasett 139
Cartwright v. Gray 126
Carvick v. Blagrave 108
Casey v. Hanlon 11
Caswell v. Coare 45
Central Bank v. Osborne 96, 151
Chamberlain v. Chamberlain 96
Chanter v. Hopkins 42
Chase v. McDonald 130

PAGE

Cheek v. Roper 26
Chesney v. St. John 68
Christie v. Griggs 71
Clark v. Eckroyd 68
Clark v. Scottish Imp 29
Clarke v. Bradlaugh 119
Clayton's Case 91
Clayton v. Corby 142
Cleave v. Jones 89
Cleaver v. North of Scotland M. Co. 8
Clendinning v. Turner 16
Clow v. Clow 21
Coates v. Coates 9
Coe v. Wise 125
Colbert v. Hicks 164
Confederation v. O'Donnell 34
Copeland v. Can. Loco. Co. 35
Corby v. Hill 123
Costello v. Hunter 46
Cowan v. Landell 151
Cox v. Hamilton Sewer Pipe Co. 137
Crathern v. Bell 41
Crawford v. Bugg 114
Crossfield v. Gould 11
Crosson v. Bigley 83
Culley v. Taylerson 196
Cunliffe v. Sefton 104
Curtis v. Spitty 110
Curtis v. Wheeler 200

D

Daines v. Hartley 156
Daniel v. M. Ry. Co. 128
Davis y. Burrell 115
Davis v. Howitt 83
Dawson v. Morgan 66
Dean v. Ont. C. M. Co. 137
Deering v. Winchelsea 65
Delong v. Burrell 137
De Medina v. Norman 11
Demorest v. Midland 99
Devine v. Griffin 8
Dixon v. Clark 98
Dixon v. Cross 112
Dixon v. Yates 185
Doe v. Passingham 194
Doe v. Payne 113
Doe d. Bond v. Burton 195
Doe d. Fleming v. Sommerton 197
Doe d. Hindly v. Rickerby 113
Doe d. Wimburn v. Kent 116
Doherty v. Allman 20
Doss v. Doss 179
Doswell v. Impey 175
Douglass v. Murphy 113
Downs v. Lee 137
Dracachi v. Anglo-American Nav. Co. 36
Drake v. Wigle 21

PAGE

Drew v. Baby 126

E

Eaves v. Dixon 45
Eckstein v. Reynolds 97
Edwards v. Hooper 190
Elliott v. Baird 143
Ellis v. Abell 9
Ellis v. Hamlin 63
Ellis v. Sheffield Gas Co. 124
Emblen v. Myers 125
Emmett v. Quinn 110
Exall v. Partridge 65
Evans v. Judkins 97
Eyles v. Ellis 92

F

Farquhar v. Farley 14
Ferguson v. Veitch 173
Fesenmayer v. Adcock 70
Field v. Mitchell 167
Finch v. Blount 191
Fisher v. Prowse 123
Ford v. Beech 92
Forsyth v. Bristowe 106
Foulkes v. Sellway 47
Fowler v. Sadler 83
Fox v. Millington 146
Frederick v. Lookup 120
Freeman v. Jeffries 68
Frye v. Milligan 44

G

Galbraith v. Irving 108, 112
Gallaway v. Herbert 196
Gardiner v. Chapman 126
Garland v. Thompson 150
Garrett v. Roberts 120
Garton v. Bristol 72
Geary v. The Gore Bank 65
Gilmour v. Supple 55
Glover v. Coleman 141
Godefroy v. Dalton 51
Godefroy v. Jay 51
Godwin v. Francis 9
Goodtitle d. Revett v. Braham 198
Gordon v. Harper 184
Goring v. Cameron 96
Gorst v. Barr 151
Goss v. Lord Nugent 9, 94
Gough v. Bench 3, 11
Gould v. Johnson 86
Gray v. Palmers 23
Green v. Burtch 70
Green v. Gosden 81
Green v. Sevin 96
Greenizen v. Burns 8
Greer v. Johnston 118

H

	Page
Hamilton v. Pandorf	37
Hardy v. Rylo	178
Hare v. Cawthrope	3, 96
Harrison v. Blades	103
Hart v. Baxendale	72
Hart v. Windsor	19
Hately v. Merchants' Despatch	39
Hathaway v. Doig	126
Henderson v. Squire	116
Hendrie v. Neelon	56
Henkel v. Pape	9
Higginbotham v. Hawkins	20
Hiort v. Bott	189
Hobbs v. L. & S. W. R. Co.	75
Holderness v. Lang	21
Holdsworth v. Wise	32
Holmes v. Goring	141
Holmes v. Kerrison	86
Holmes v. Mather	127
Holroyd v. Marshall	186
Hope v. White	169
Howard v. Lancashire	34
Howard v. Shaw	17
Howard v. Tucker	37
Huntley v. Russell	20
Hyde v. Bulmer	150

I

Imperial Bank v. Docks Co	192
International Wrecking Co. v Lobb	39
Irons v. Smallpiece	185

J

Jackson v. Allen	105
Jackson v. Tollet	127
Jacobs v. Seward	190
Jefferson v. Morton	195
Jeffries v. G. W. Ry. Co.	188
Jenner v. Smith	55
Johnson v. Durant	48
Johnson v. Midland Ry. Co.	71
Johnston v. Sumner	61
Johnstone v. Huddlestone	118
Jones v. Corbett	23
Jones v. James	46
Josling v. Kingsford	43

K

Kaatz v. White	22
Kannen v. McMullen	52
Kennedy v. Oldham	8
Kimball v Smith	173
Kingsford v. Merry	186
Kinloch v. Craig	192
Kinnaird v. Webster	91
Kitching v. Hicks	81
Knight v. Egerton	168
Koster v. Innes	30

L

Laing v. Fidgeon	43
Laird v. Paton	12
Lamb v. Walker	138
Lawrence v. Errington	13
Law Society U. C. v. City of Toronto	69
Ledyard v. McLean	11
Lee v. Shore	57
Leigh v. Thornton	19
Lickbarrow v. Mason	29, 192
Lockridge v. Lacey	99
Long v. Long	99
Loomer v. Marks	80
Lord v. Davidson	36
Lundie v. Robertson	26
Lunn v. Thornton	186
Lythgoe v. Vernon	69

M

Mackreth v. Symmons	192
Manby v. Scott	61
Marriot v. Hampton	69
Martin v. Andrews	68
Martyn v. Williams	107
Mason v. Hill	143
Mason v. Morgan	130
Mason v. Rumsey	23
Matthews v. Baxter	85
Matthews v. Hamilton Powder Co.	137
Maughan v. Casci	140
Maugham v. Hubbard	104
Merchants' Bank v. McDougall	26
Merchants v. Rumsey	29
Meredith v. Meigh	58
Merryweather v. Nixan	66
Midland Ry. Co. v. Ontario Rolling Mills	91
Miller v. Newman	57
Miller v. Race	188
Miner v. Gilmour	142
Minshull v. Oakes	115
Mitchell v. Henry	146
Mitchell v. Reynolds	83
Moens v. Hayworth	81
Monteith v. Walsh	96
Montgomery v. Spence	111
Moore v. Buckner	48
Morley v. Attenborough	41
Morris v. Williams	114
Moxley v. Can. Atl. Ry. Co.	137
Mucklow v. Mangles	185
Munsie v. Lindsay	21
McCall v. Theal	145
McCallum v. Snyder	169
McCann v. Chisholm	138

PAGE

McCarthy v. Cooper 9
McClung v. McCracken 9
McDonald v. Brennan 18
McDougall v. Ridout 112
McEdwards v. Ogilvie Milling Co 53
McEwan v. McLeod 38
McFarren v. Johnson 9
McGibbon v. N. Ry. Co..... 131, 137
McGowan v. Middleton..... 96
McKay v. Grinley 70
McKenzie v. Dancey..... 38
McLaren v. Canada Central 131
McLay v. Bruce 151
McLaughlin v. Moore 46
McLellan v. Winston 64
M'Manus v. Cricket 127
McMaster v. Geddes 69
McNab v. Wagstaff 65

N

Neal v. Ewing 28
Neil v. Park 3
Nelson v. Whittall 103
Newcombe v. Anderson 75
Newton v. Allin 110
Nichols v. Pitman 145
Nicholson v. Revill 92
Noble v. Ward 93
North American v. Craigen 34
Norton v. Ellam 85

O

Oliver v. Powell 195
Ord v. Portall 25
Ormond v. Holland 135
Owen v. Taylor 169

P

Paisley v. Broddy 80
Panama Mail Co. v. Kennedy ... 81
Parkinson v. Lee 42
Partridge v. Scott 138
Pasley v. Freeman 150
Patrick v. Milner 10
Pearson v. Spencer 140
Peck v. Powell 12
Penny v. Foy 119
Penruddock's Case 124
Phene v. Popplewell 109
Phœnix v. Anchor 32
Pickford v. Grand Junction Ry. Co. 71
Pigot's Case 80
Planche v. Colburn 63
Porter v. McMahon 150
Potter v. Rankin 30
Preston v. Camden 137
Price v. Lloyd 16

PAGE

Price v. Moulton 90
Priestly v. Fernie 60

Q

Queen v. Silvester 83

R

Randell v. Trimen 45
Read v. G. E. R. Co..... 137
Regina v. Woodworth 151
Reignolds v. Edwards 141
Richard v. Stillwell 41
Rivers v. Griffiths..... 99
Roberts v. Bethell..... 23
Robertson v. Skelton..... 11
Rochleau v. Bidwell 8
Rolfe v. Abbott 61
Ross *re* 67
Routledge v. Ramsay 90
Rowley v. L. & N. W. R. Co. ... 129
Rudd v. Bell..... 137
Rushforth v Hadfield 191
Ryall v. Rich 117
Ryan v. Fish.....3, 182

S

Sanderson v. Burdett 10
Saner v. Bilton 96
Saunders v. Breakie 21
Saxby v. Easterbrook 153
Sayles v. Brown 80
Scaramanga v. Stamp 38
Schultz v. Reddick 167, 168
Scott v. Crerar 150
Seagrave v. Union 29
Sears v. Lyons 180
Severin v. Keppell 190
Sharp v. Powell 125
Simmonds v. Parminter 25
Smiles v. Belford..... 144
Smith v. Ashforth 167
Smith v. Chance 58
Smith v. Marrable 19
Smith v. McGuire..... 37
Smith v. Peat 115
Smith v. Thorne..... 89
Smith v. Young 190
Smyth v. Anderson 60
Snarr v. Granite 138
Sommerville v. Rae 80
Steinhoff v. Kent..... 137
Stephens v. Elwall 190
Stephenson v. Bain..... 11
Stewart v. London & N. W. Ry. Co..... 75
Still v. Halford 48
Stimson v. Block 183
Stinson v. Magill..... 113

PAGE

Stone v. Marine Ins. Co 30
Stooke v. Taylor 95
Street v. Blay 54
Sturgeon v. Wingfield 108
Sturges v. Bridgman. 123
Summerfeldt v. Worts. 83
Swain v. Lewis..... 197

T

Tancred v. Leyland 165
Tarling v. Baxter 184
Tarrant v. Webb 135
Taylor v. Chester 82
Thomas v. Crooks 14
Thomas v. Evans..... 97
Thomson v. Davenport 59
Tilley v. Thomas 11
Tipping v. St. Helen's Smelting Co. 123
Toleman v. Portbury 115
Topham v. Dent..... 180

U

Urquhart v. Macpherson..... 69, 93
U. S. Exp. Co. v. Donohoe..... 68

V

Van Dieman v. Victoria 26
Vaughan v. Taff Vale Ry. Co.... 131
Vickers v. Wilcocks 74

W

PAGE

Wade's Case 98
Wallis v. Harold 18
Ward v. Morse 96
Watson v. Threlkeld... 61
Waynam v. Bend. 24
Webb v. Fairmaner..... 62
Wells v Abrahams 69
Wells v. Lindop 150
West v. Blakeway 93
Western v. Scanlan 33
Wheeler v. Montefiore..... 179
Whynan v. Garth 103
Wilks v. Atkinson 56
Wilkinson v. King 186
Williams v. Earle 114
Willis v. De Castro 92
Willoughby v. Backhouse 93
Wilmot v. Stalker..... 8
Wilson v. Finch Hatton 19
Wilson v. Rykert 90
Winfield v. Kean..... 163
Winterbottom v. Derby 122
Winterbottom v. Ingham 17
Withy v. Cottle 10
Wittrock v. Hallinan 107
Wolfenden v. Wilson 64
Wray v. Morrison..... 138
Wright v. Court 177
Wyld v. Pickford 73
Wynne's Case 105

Y

Yarwood v. Hart 46

ABBREVIATIONS.

In referring in the text to the English Reports tho usual mode of citation, as given in English digests, has been followed. The following abbreviations relate to Canadian Statutes and Reports :—

A.R ..... Court of Appeal Reports, Ontario.
Chy. R ..... Upper Canada Reports, Court of Chancery (Grant's).
C.R .... Consolidated Rules of Practice, Supreme Court of Judicature, Ontario.
O.R ..... Ontario Reports.
P.R ..... Practice Reports.
R.S.C ..... Revised Statutes of Canada.
R.S.O. (1887).. Revised Statutes of Ontario (1887).
S.C.R ..... Supreme Court Reports, Canada.
U.C.C.P..... Upper Canada Reports, Common Pleas.
U.C.R..... Upper Canada Reports, Queen's Bench.

MANUAL OF EVIDENCE

IN CIVIL CASES.

In dealing with the law of evidence the subject may be considered with regard to:

1. The nature of evidence.
2. The object of evidence.
3. Proof of documentary evidence.
4. Proof by witnesses.
5. Proof by affidavits or depositions.
6. The effect of evidence.

The knowledge of these branches may be described as book work.

The next steps in dealing with evidence are, the course of evidence and the practice at *Nisi Prius*. Many difficulties formerly met are now settled by Statute and Rules of Court, which are printed as an appendix to this Manual.

Finally, the essentials of proof in the different species of actions are an absolutely necessary application of the law of evidence.

A thorough acquaintance with this last branch can only be acquired systematically by practice. There are, however, certain lines of proof which can be pointed out as being appropriate to each species of action, and it is with these I propose to deal.

Before commencing the discussion of the evidence required in the various kinds of actions, it is necessary to explain the assumption on which I proceed.

The powers of amendment now given to the courts are very extensive.

See Supreme Court Rules* 423, 444 and 780.

The words of C. R. 423 are:

The Court or Judge may at any stage of the proceedings order to be struck out or amended any matter in the pleadings respectively which may be scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action.

C. R. 444 is as follows:

The Court or a Judge may at any time, and on such terms as to costs or otherwise as to the Court or Judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question or issue raised by or depending on the proceedings, and best calculated to

* Referred to hereafter by the abbreviation "C. R.," as in volume of Consolidated Rules.

secure the giving of judgment according to the very right and justice of the case.

C. R. 780 allows amendments of clerical slips.

How the powers of amendment have been applied can be seen in

Gough v. *Bench*, 6 O. R. 706.
Neil v. *Park*, 10 P. R. 476.
Ryan v. *Fish*, *Ibid* 187.
Hare v. *Cawthrope*, 11 P. R. 353.

It follows that a case based on a certain set of pleadings may, by amendment, become so altered as to be a different species of claim. The requisites for proof will vary as the amendments vary. The fact that the nature of the case has altered does not alter the requisites for the proof of the amended claim. My assumption, then, is that the precise claim has been defined, whether on the pleadings as they originally stood or by amendment.

Again, it is necessary to call attention to the distinction between the English and Ontario systems of pleading.

In Ontario, C. R. 403 provides that "the silence of a pleading as to any allegation contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allega-

tion." C. R. 400 requires "each party [to] admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true."

The English Rules (Order 19, Rules 17, 20, 22) provide that the want of denial of a fact will operate as an admission, and will entitle a party to move for judgment.

In other words, in Ontario the plaintiff must prove his case; in England he may not be compelled to do so.

If this distinction is not borne in mind English cases may mislead here.

A further point to be remarked is the effect of a non-suit under C. R. 797. By that rule "any judgment of non-suit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, accident, or otherwise, any judgment of non-suit may be set aside on such terms as to payment of costs and otherwise as to the Court or Judge shall seem just."

The consequences of a failure to prove the plaintiff's case may be more serious under this rule than formerly.

I now proceed to consider the various species of actions in their order, and the mode in which I propose to deal with the subject is to adopt the general

division of actions, viz., those on contracts (simple or by specialty), and those on wrongs independent of contract, and to state:

1. Where necessary, observations as to the gist of the action.
2. Plaintiff's case.
3. Defence.

On the latter point, only special defences will be noticed. Defences which may be common to all actions will be discussed in the sequel.

PART I.

ACTIONS ON SIMPLE CONTRACTS.

The actions under this heading are as follows:—

	Page
Sale of real property	7
Use and occupation	15
Waste, bad husbandry, etc.	19
Bills of exchange, cheques and promissory notes	22
Policy of insurance	28
Contract of affreightment	35
Guarantee	39
Warranty	41
Promise of marriage	45
Award	47
Solicitor's bill	49
Against solicitor for negligence	50
By medical practitioners	51
For wages or wrongful dismissal	52
Not accepting goods	53
Not delivering goods	56
Goods sold and delivered	57
Work and materials	62
Money paid	65
Money lent	66

PAGE
Money had and received 67
Account stated 70
Against carriers 70
Against innkeepers 75
Against pawnbrokers 76

ACTION ON SALE OF REAL PROPERTY.

This action may be brought either by vendor against vendee, or by vendee against vendor. It includes claims for specific performance of contracts of sale, and is often met by a counter claim for rescission of the alleged contract. It frequently ends in a reference as to damage sustained by aggrieved party.

VENDOR AGAINST VENDEE.

In an action on sale of real property by vendor against vendee on purchaser's default, the plaintiff must prove:

1. The contract.

2. The performance by himself of all conditions precedent.

3. The default.

As to proof of the contract, the provisions of the Statute of Frauds (29 Car. II. c. 2, s. 4) must be borne

in mind. A defence under this statute must now be pleaded specially.

Greenizen v. *Burns*, 13 A. R. 481.

When it is so pleaded it will be necessary to prove a contract in writing.

See *Cleaver* v. *North of Scotland M. Co.*, 27 Chy. 508.

A question often arises as to what is an "interest in or concerning" land, etc., within section 4 of above Act.

The note or memorandum required by the statute must be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized. Subject, terms, and names of the parties must appear.

As to names,

See *Wilmot* v. *Stalker*, 2 O. R. 78.
Cameron v. *Spiking*, 25 Chy. 116.

As to terms,

See *Devine* v. *Griffin*, 4 Chy. 603.

It is not necessary that the names or terms should appear in any single paper. The contract may be collected from several connected papers.

Rochleau v. *Bidwell*, Dra. 345.
Kennedy v. *Oldham*, 15 O. R. 433.

The connection ought to appear on the papers, and not by extrinsic oral evidence only.

McClung v. *McCracken*, 3 O. R. 596.

When a proposal is made in writing by one party and accepted by the other, either verbally or by acting upon it, the contract is a written one.

Ellis v. *Abell*, 10 A. R. 226.

An agreement good under the Statute of Frauds can, it seems, be wholly rescinded, but cannot be varied by a subsequent oral agreement.

Goss v. *Lord Nugent*, 5 B. & A. 58. (See p. 93 *post.*)

The person authorized by the party to sign need not be authorized in writing. As to telegrams, see

Godwin v. *Francis*, L. J. 5 C. P. 295.
Henkel v. *Pape*, L. J. 6 Exch. 7.
McFarren v. *Johnson*, 6 O. R. 161.
McCarthy v. *Cooper*, 12 A. R. 284.

Where there has been a part performance of a contract falling within the provisions of the Statute of Frauds (sec. 4), although there is no written note or memorandum of the agreement, as required by the section, specific performance will be ordered.

Alderson v. *Maddison*, 8 App. Ca. 420.
Campbell v. *McKerricher*, 6 O. R. 85.
Coates v. *Coates*, 14 O. R. 195.

The Courts will enforce the contract where the absence of a written memorandum is caused by *fraud.*

The plaintiff must next prove *performance of conditions precedent.*

If *the vendor's title* be put in issue, he must prove it. This is generally done on reference. The Court refers the question of title to the Master to report upon, reserving costs until he shall have made his report.

See *Vendors and Purchasers Act* (R. S. O. 1887, c. 112) and the *Act respecting the law and transfer of property* (R. S. O. 1887, c. 100), and also the provisions of the *Registry Act* as to the effect of registering. These enactments have rendered evidence of title more simple.

When a day is fixed for completion, unless the vendor make out a good title by that day the purchaser was at law entitled to rescind the contract; but not so in equity, which now prevails. The equitable principle does not apply where the property fluctuates in value from day to day, as in the case of a life annuity,

Withy v. *Cottle*, Turn. & R. 78,

See also *Sanderson* v. *Burdett*, 16 Chy. 119.

or of a reversion,

Patrick v. *Milner*, 2 C. P. D. 342,

nor where property is bought for the purpose of residence,

Tilley v. *Thomas*, L. J. 3 Chy. 61.
See also *Crossfield* v. *Gould*, 9 A. R. 218.

An averment of *readiness to convey* is negatived by proof of a defective title, for it negatives ability to convey.

De Medina v. *Norman*, 9 M. & W. 820.

Accidental deterioration after the date of the contract is a loss which must fall on the vendee.

Robertson v. *Skelton*, 12 Beav. 260.
See also *Stephenson* v. *Bain*, 8 P. R. 258.

The Court has cognizance of all the rights of all the parties arising out of an agreement; and if either is entitled to damages the Court ought to ascertain them.

Casey v. *Hanlon*, 22 Chy. 445.
See also *Ledyard* v. *McLean*, 10 Chy. 139.
Gough v. *Bench*, 6 O. R. 699.

A reference having been taken in the latter case the result is reported in 9 P. R. 431. The conduct of the party asking damages being held to be virtually fraudulent, he was declared to be disentitled to damages.

As to costs, the ordinary rule in a vendor's suit is that the costs are given against him up to the time when he has first shown a good title; but where the

question as to title is not the chief matter in dispute the costs will follow the result.

Laird v. *Paton*, 7 O. R. 137.

When the price is payable by instalments the purchaser of land has a right to have a reference as to title, and to have title manifested before he makes a single payment.

Cameron v. *Carter*, 9 O. R. 426.

If the parties have, before suit, carried out any of the terms of a contract, such executed portions will not be disturbed.

Peck v. *Powell*, 11 S. C. R. 494.

DEFENCE.*

Denial of contract. See C. R. 413. This rule requires the defendant specifically to allege in his defence that he relies on the Statute of Frauds, or on fraud, or misdescription.

The position of a defendant resisting a claim is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which

* See *post* as to defences available in actions generally. In this Part a few special observations only are made with regard to defences peculiarly applicable to the action under consideration. See page 5 *ante*.

may not have been defined so as to clearly satisfy the requirements of the statute.

Lawrence v. *Errington*, 21 Chy. 261.

Where more than one person is employed by the vendor to bid at a sale by auction, this will be deemed a fraud. See R. S. O. 1887, c. 100.

Other special defences are: Imperfection of title, defects in subject-matter of contract.

VENDEE AGAINST VENDOR.

If vendor refuse or is unable to complete his contract, purchaser may sue for damages; or if purchaser has paid a deposit or part of purchase money, and has not taken possession, he may sue to recover his money. So, if fraud practised, he may rescind and sue for deposit.

In a special action on the contract by the purchaser, he must prove the contract. He must prove the performance of conditions precedent.

To enable purchaser to maintain an action for money had and received in order to recover the deposit the contract must be disaffirmed *ab initio* upon grounds entitling him to such disaffirmance.

When plaintiff seeks to recover the deposit he must prove payment to defendant or defendant's agent.

Where the contract is oral he can recover deposit only, but no damages. In other cases he may get the deposit with interest and expenses of investigating title, etc.

Farquhar v. *Farley*, 7 Taunton 592.

If the purchaser has taken possession of the premises under the contract, he has adopted the contract, and cannot disaffirm it afterwards by quitting the premises. His remedy is then on the contract itself.

Blackburn v. *Smith*, 2 Ex. 783.

Where, on a sale of land, there has been a conveyance perfected, and the seller having no title, the purchaser is evicted, unless fraudulent misstatement or concealment is made out, there can be no action except on the covenants, and where there are no covenants, or none that will extend to the cause of action, there can be no action against the vendor.

Thomas v. *Crooks*, 11 Q. B. 579.

The purchaser is not in general entitled to recover "fancy" compensation where the vendor is, without fraud, incapable of making a title.

Bain v. *Fothergill*, L. R. 7 H. L. 158.

Where, however, the sale does not go off for want of title, but by reason of the refusal of the vendor to take the necessary steps to give possession, the plain-

tiff can recover damages for the loss of the bargain, the measure of damages being the difference between the contract price and the market price at the time of the breach. (S. C.)

Where the contract contains a variety of stipulations of different importance, and one sum is stated to be payable on breach of performance of any one of them, then, though it be called liquidated damages, it is in reality a penalty, and the actual damage sustained is alone recoverable.

Ex pte., Capper, 4 Ch. D. 724.

ACTION FOR USE AND OCCUPATION.

Founded on 11 Geo. II., c. 19, s. 14.*

This is a form of action on the case, based on the relationship of landlord and tenant.

Action *of debt* for rent on a contract for use and occupation lies at common law, and not on this statute.

The plaintiff proving a legal title to the premises,

* The section is as follows:—It shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendants in an action on the case for the use and occupation of what was so held and enjoyed; and if, on the trial of such action, any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not, therefore, be non-suited, but may make use thereof as evidence of the quantum of damages to be recovered.

and a mere naked possession by the defendant, is entitled to a verdict. He need not prove an attornment or contract between himself and defendant.

Price v. *Lloyd*, 3 U. C. R. 120.

In *Clendinning* v. *Turner*, 9 O. R. 34, a defendant counter claimed for use and occupation against a plaintiff. He was held not entitled on the evidence.

If defendant has come in under plaintiff, or has acknowledged title by payment of rent or otherwise, he cannot dispute plaintiff's title, but he may show it has expired.

In general, title of plaintiff is established by the production of writing or agreement, which is proved in the usual manner; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him or submitted to a distress. Notice to produce the receipt for rent, or the notice of distress, should in such cases be given by the plaintiff.

If it appear from the plaintiff's witnesses that defendant holds under a written agreement not produced, plaintiff will not be allowed to give oral evidence of the holding; but if plaintiff has made out a *prima facie* case, and the defendant seeks to show that he holds under a written agreement, he must produce the instrument, or his objection is untenable.

There must be an occupation or holding, actual or constructive; therefore a tenant who has agreed to take premises, but has not entered, is not liable to an action for use and occupation.

It is *prima facie* sufficient for the plaintiff to prove that the defendant did occupy the premises, and the continuance of the occupation will be presumed until the contrary appears.

If, after the determination of a lease, the tenant holds over and pays rent, such holding over and payment of the rent are conclusive evidence of a tenancy; and he will be liable in an action for use and occupation for the time that he occupies the premises.

Bishop v. *Howard*, 2 B. & C. 100.

It is not necessary that there should be an express contract creating the relation of landlord and tenant between the parties; the relation may be implied. Thus where the defendant has entered under a contract for sale, which ultimately goes off, and his occupation has been a beneficial one, he may be liable in this action, but only for the period since the putting an end to the contract.

Howard v. *Shaw*, 8 M. & W. 118.
Winterbottom v. *Ingham*, 7 Q. B. 611.
Burrows v. *Gates*, 8 U. C. C. P. 121.

Where rent is mentioned in the lease or agreement, such rent will be the measure of damages; but where there is no lease, the value of the premises must be proved.

Executors may sue for use and occupation of testator's land during his lifetime, but not where the agreement has been that the tenant should pay in produce, not money.

Wallis v. *Harold*, 23 U. C. R. 279.

DEFENCE.

The defendant may rely on termination of tenancy, either by expiry of landlord's title, or notice to quit, or eviction, or the bringing of an action of ejectment, or payment, or that the premises have been knowingly let for an immoral purpose.

Where it is quite evident that defendant did not occupy under the plaintiff, or with his permission, either express or implied, but under a third party, the plaintiff will be non-suited.

McDonald v. *Brennan*, 5 U. C. R. 599.

The defendant in the case of a ready-furnished house may rely upon the defence that there has been no

beneficial occupation, whether by reason of the house being infested with vermin,

Smith v. *Marrable*, 11 M. & W. 5,

or of defective drainage,

Wilson v. *Finch Hatton*, 2 Ex. D. 336.

The tenant may give up occupation, and then ceases to be liable to pay rent. Not so in the case of an unfurnished house.

Hart v. *Windsor*, 12 M. & W. 68, 86.

The Statute of Limitations is a good defence in an action against a person who has been tenant from year to year, but who has not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy may be inferred, though no notice to quit has been given.

Leigh v. *Thornton*, 1 B. & A. 625.

If landlord has distrained and retained the distress, though insufficient in amount, he cannot maintain the action.

ACTION FOR WASTE, BAD HUSBANDRY, ETC.

Action for waste lies on a contract not under seal, express or implied, and is in some cases founded on

wrong, independent of contract, arising out of the relation of landlord and tenant. In the former case the plaintiff must prove the contract, and the acts complained of which form the violation of the contract. In the latter case the plaintiff will have to prove the demise, the breach of covenant, and in both cases the damage.

The general rule as to waste at common law is, that in order to constitute it there must be a diminution of value of the estate by it, or an increased burden upon it, or an impairing of the evidence of title.

Huntley v. *Russell*, 13 Q. B. 572.

The right of a remainder-man to sue tenant for life for waste arises when the waste is committed, and the Statute of Limitations then begins to run.

Higginbotham v. *Hawkins*, L. R. 7 Chy. 676.

In this action the defendant is entitled to the verdict unless the damages are substantial.

Doherty v. *Allman*, 3 Ap. Cas. 733.

Where the intention of the testator requires that an estate, devised in terms larger than a mere life estate, shall be cut down to a life estate in order to give effect to other conflicting dispositions of the same property, there the Court will deal with such a life estate as one

unimpeachable for waste. In this case *White* v. *Briggs*, 2 Phil. 583, distinguished, and life tenant held liable for waste.

Clow v. *Clow*, 4 O. R. 355.

A tenant for life in this country may cut down timber in the proper cause of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber; but he cannot cut down timber even for the same purpose and sell it.

Saunders v. *Breakie*, 5 O. R. 603.

A tenant in common is not liable to his co-tenants for cutting timber on the common property.

Munsie v. *Lindsay*, 10 P. R. 173.

If the reversion be not injured by the acts complained of, there can be no waste and no forfeiture.

Holderness v. *Lang*, 11 O. R. 1.

It is not waste in a tenant for life to cut down timber on wild land for the sole purpose of bringing it into cultivation, provided the inheritance be not damaged thereby, and it is done in conformity with the rules of good husbandry.

Drake v. *Wigle*, 24 U. C. C. P. 405.

It is a question for the jury to find if the acts com-

plained of amount to a breach of the covenant not to commit waste.

Campbell v. *Shields*, 44 U. C. R. 449.

The obligation to *good husbandry* arises either by contract or mere relation of tenant, not with us from local custom. As to custom, see

Burrowes v. *Cairns*, 2 U. C. R. 288,

followed in

Kaatz v. *White*, 19 U. C. C. P. 36.

As to proof of breach of covenant to repair or to use good husbandry, see *post*, page 114.

ACTIONS ON BILLS AND NOTES.

See R. S. C. c. 123, and C. R. 301, 303, 631, 679.

PAYEE v. MAKER OF NOTE OR ACCEPTOR OF BILL.

Plaintiff must prove handwriting of person whose name appears as maker of note or acceptor of bill.

The acceptance is proved by evidence of the acceptor's handwriting, and the production of the bill with such proof is *prima facie* evidence of acceptance before action brought, as the presumption is that it was accepted within a reasonable time after date, accord-

ing to the regular course of business, and before maturity.

Roberts v. *Bethell*, 12 C. B. 778.

If several (not partners) are acceptors, the handwriting of all must be proved.

Gray v. *Palmers*, 1 Esp. 135.

If one of several partners accepts a bill drawn on the firm, it is sufficient to prove the partnership and his handwriting in an action against all.

Mason v. *Rumsey*, 1 Campbell 384.

It is a good defence that the plaintiff had notice that the firm would not be bound by such an acceptance,

Jones v. *Corbett*, 2 Q. B. 828,

or that the bill was not accepted for partnership purposes, and that there was covin between the partner who accepted and the plaintiff.

If the acceptance is by an agent, his authority and handwriting must be proved.

Proof of presentment is necessary against the acceptor on a qualified acceptance, but not on a general acceptance, even where the bill is payable on demand.

If the bill or note be payable after sight, it must be presented in order to charge the acceptor or maker.

INDORSEE v. MAKER OR ACCEPTOR.

Plaintiff must first prove the making of the note or acceptance of the bill. The acceptance admits the drawing. Then the indorsement must be proved, and, if special, it must appear that the indorsee is the person described in it.

If instrument be payable to bearer, or indorsed in blank, it is unnecessary to prove a subsequent indorsement unless alleged. A promise to pay, or an offer to renew a bill or note made to the indorsee after it is due, is an admission of the holder's title, and will make the proof of indorsement unnecessary; but the admission of the indorser is evidence against him only, not against other parties.

When the indorsement is by an agent, it is necessary to show that the person by whom the indorsement is written had the authority of the person whose name is written. In such a case an authority to draw does not of itself impart an authority to indorse bills, but it is a fact which ought to go to the jury as evidence.

All the indorsements that have been stated, though unnecessary, must be proved against the acceptor.

Waynam v. *Bend*, 1 Campbell 175.

By striking out intermediate indorsements the plaintiff loses the security of those indorsers.

When a bill is indorsed in blank, possession is sufficient *prima facie* title, and several plaintiffs suing as indorsees need not prove that they are in partnership, or that the bill was indorsed to them jointly.

Ord v. *Portall*, 3 Campbell 239.

But where it is specially indorsed to a firm the partnership must be proved to consist of the plaintiffs, if sued in individual names of persons composing firm, and not firm name.

DRAWER v. ACCEPTOR.

When a bill, though not payable to the drawer's own order, has been dishonoured by the acceptor and taken up by the drawer, he may sue the acceptor.

Simmonds v. *Parminter*, 1 Wilson 185.

He must prove:

1. The acceptance.

2. The presentment to the defendant and his refusal to pay, which may be done by calling the person who presented the bill, or by proving a promise by the defendant to pay, which dispenses with proof of the presentment.

3. The return of the bill to and payment thereof by the plaintiff.

PAYEE OR INDORSEE v. DRAWER.

The plaintiff must prove:

1. The drawing of the bill.

This must be proved by evidence of the drawer's handwriting, or, if drawn by an agent, by proving the authority of the agent and his handwriting.

2. Presentment to the drawee for acceptance, or to the acceptor for payment.

It is not sufficient to show that the bill was presented to some person on the drawee's premises without connecting him with the drawee.

Cheek v. *Roper*, 5 Esp. 175.

The bill must be left with the drawee for twenty-four hours, unless during that time he either accept or refuse to do so.

Van Dieman v. *Victoria*, L. R. 3 P. C. 543.

A part payment, or a promise to pay after the bill is due, is *prima facie* evidence as an admission that the bill was duly presented.

Lundie v. *Robertson*, 7 East 231.

3. Default.

4. Notice of dishonour.

See *Merchants Bank* v. *McDougall*, 30 C. P. 236.

5. In case of an indorsee, the indorsements.

INDORSEE v. INDORSER.

First prove indorser's signature, which admits ability, and signature of every antecedent party; then presentment for payment or acceptance and dishonour; lastly, notice of dishonour or competent excuse for neglecting to give it.

DEFENCES TO ACTIONS ON BILLS OF EXCHANGE AND PROMISSORY NOTES.

The principal defences are as follows:

Negotiation of overdue or dishonoured bill.

Loss of bill.

Alteration.

Payment.

Failure or want of consideration.

Fraud.

Forgery.

Illegality.

Illegality of consideration.

Agreements at variance with bill or note.

Voluntary discharge and waiver.

Alteration of the position of the parties, giving time, etc.

ACTION ON POLICY OF INSURANCE.

MARINE INSURANCE.

The plaintiff may be called on to prove the following facts:—

1. The subscription or execution of the policy by the defendant.

The policy must be produced and proved, and if subscribed by an agent of the defendant the handwriting and authority of the agent must be proved. If the authority of the agent was in writing, it should generally be produced; but the authority may also be proved by showing that the defendant has recognized the act of the agent in this instance, or in other similar instances in which he subscribed policies for the defendant.

Neal v. *Erving*, 1 Esp. 61.
Brocklebank v. *Sugrue*, 5 C. & P. 21.

2. The interest of the party as averred.

Insurances without interest, or wagering policies on British ships or goods therein, are void by 19 Geo. II. c. 37, s. 1, and the interest must be proved otherwise than by the policy itself. In the case of foreign ships interest need not be alleged or proved.

A party has a right to insure property over which

he has an equitable lien. Neither the actual nor constructive possession of the property is necessary to be in the insurer, either at the time of issue of the policy or when the loss insured against takes place. It is sufficient if he have an equitable lien on the specific chattel property covered by the policy.

Clark v. *Scottish Imp.* 4 S. C. R. 192.

The interest in the ship, as stated in the claim, may be proved *prima facie* by evidence of possession of the ship, or of acts of ownership, as directing the loading of the ship, purchasing the stores, paying the people employed, etc. A common mode of proof is to call the master, who will prove that he was appointed and employed by the parties in whom the interest is averred.

The interest in goods may be proved *prima facie*, like the interest in the ship, by evidence of possession and acts of ownership. It is also frequently proved by the production of the bill of lading.

Lickbarrow v. *Mason*, 2 T. R. 71.
Seagrave v. *Union*, L. R. 1 C. P. 305.

The plaintiffs held to have an insurable interest under the agreement in evidence on goods on board when policy effected, and also on return cargo.

Merchants v. *Rumsey*, 9 S. C. R. 577.

3. The putting of the goods on board when the policy is on goods.

The shipment of goods on board is usually proved by the captain. If he be dead, the production of the bill of lading and proof of his handwriting will be evidence of the shipping.

In an action upon a policy on freight the assured must show that some freight would have been earned, either by proving that some goods were put on board, or that there was some contract for doing so.

See *Potter* v. *Rankin*, L. R. 6 H. L. 83.

4. The inception of the risk.

Where the vessel is lost in the course of a voyage for which she is insured, some proof of the inception of the voyage or risk must be given.

Koster v. *Innes*, Ry. & M. 333.

This may be proved by some of the crew, or proof of a particular destination by charter party will afford a presumption that she sailed on the chartered voyage.

The risk in the case of a voyage policy on the ship to a port, without any provision as to her safety there, terminates when she is anchored at the port in the usual place for discharge of her cargo.

Stone v. *Marine Ins. Co.*, 1 Ex. D. 81.

But the policy usually extends in terms to the end

of a period of twenty-four hours after mooring in safety in port.

In the case of goods the risk depends on the agreement of the parties, but it usually begins with the loading on board and ends with the safe discharge, including their passage to the shore by usual means.

5. Compliance with warranties.

Warranties may be either express or implied. Implied warranties are:

(1) That there shall be no deviation from the voyage insured.

(2) That it shall be commenced without unreasonable delay.

(3) That all material circumstances shall be disclosed to the underwriters.

(4) That the ship shall be seaworthy.

A breach of these conditions avoids the policy, whether there be fraud or not.

6. A license for the purpose of legalizing the voyage in some cases, *e.g.*, in case of war trading with an alien enemy.

7. The loss.

A loss may be total or partial, and a total loss may be either actual or constructive.

Where the loss is actually total no abandonment is

necessary to found a claim, *e.g.*, where the ship is lost, or destroyed, or captured, or reduced to a wreck.

In order to make out a constructive total loss the plaintiff must show that the cost of repair would have exceeded the value of the ship when repaired.

In order to justify an abandonment there must have been that in the course of the voyage which at the time constituted a total loss.

Holdsworth v. *Wise*, 7 B. & C. 794.

A mortgagee can recover in case of an actual total loss. He is not precluded from recovering as for a constructive total loss upon giving notice of abandonment.

Anchor v. *Keith*, 9 S. C. R. 483.

As to liability of re-insurer see

Phœnix v. *Anchor*, 4 O. R. 524.

Notice of abandonment must be given. It may be made orally.

8. The amount of it.

In open policies the assured must prove the extent of his loss.

In valued policies, if the loss be a total one, the assured is only bound to prove some interest in the ship or goods.

Where the loss is partial the plaintiff is as much

bound to prove the value of the goods that have been lost, and to ascertain the damage he has sustained by the loss, as in the case of an open policy.

The amount recoverable depends on the value of the thing insured, the sum insured, and the amount of loss.

In ascertaining this loss in an action on an open policy the true value of the thing insured is the criterion; but on a valued policy the assured can only recover to the amount that the thing is valued in the particular policy, and if he has already received that value on another policy he cannot recover anything further, although the true value and the loss be beyond what he has already received.

Bruce v. *Jones*, 1 H. & C. 769.
Anchor v. *Phœnix*, 6 A. R. 567.

Claim for return of premium is often added to a claim on the policy, and the question of the right to recover arises on the failure of the plaintiff to establish his case on the policy.

See *Western* v. *Scanlan*, 13 S. C. R. 207.

Where policy is void *ab initio*, or where there is no insurable interest innocently, premium or part of it may be recovered.

If the risk has never commenced there must be a

return, or if the policy is avoided by failure of warranty without fraud.

DEFENCES.

Any special defence must be set up, such as insufficient subscription, concealment, misrepresentation, fraud, illegality.

LIFE INSURANCE.

Same general line and same defences, remembering that this is not a contract of indemnity, and bearing in mind Stat. 14 Geo. III. c. 48, as to insurable interests.

Confederation v. *O'Donnell,* 13 S. C. R. 218.
North American v. *Craigen,* 13 S. C. R. 278.

FIRE INSURANCE.

Contract of indemnity within 14 Geo. III. c. 48.

It is necessary to show an interest in the subject insured at the time of insuring and of the fire.

Howard v. *Lancashire,* 11 S. C. R. 92.

Being a contract of indemnity, the assured can only recover the actual loss or damage sustained by him, according to the real quantities and value of the goods at the time of the fire.

Caldwell v. *Stadacona,* 11 S. C. R. 212.

ACTION ON CONTRACT OF AFFREIGHTMENT.

Lies by or against a shipowner, whether ship be general or special. Contract need not be under seal.

In case of a general ship, the bill of lading,

In case of a chartered ship, the charter party is the proof of the contract.

A bill of lading is a receipt for the goods, with an obligation to transport the same.

See R. S. O. 1887, c. 122; R. S. C. c. 120.
See *Copeland* v. *Can. Loco. Co.*, 14 O. R. 170.

A charter party commonly contains clauses—

On part of shipowner for seaworthiness, receipt and delivery of cargo, and performance of voyage, with an exception of certain perils;

On part of freighter, to load in a given time and to pay freight and demurrage.

The master of the ship is agent of the owners, and can sue and be sued in his own name, and can sign a charter party or bill of lading in his own name and bind owners.

In ordinary course consignor sends bills of lading and bills of exchange, thus transferring property and possession of goods consigned to consignee. Where sent to agent of consignor, then property does not pass until consignee accepts bills of exchange.

The right of suing upon a contract under a bill of lading follows legal title to the goods as against the indorser.

Dracachi v. *Anglo-American Nav. Co.*, L. R. 3 C. P. 190.

SHIPOWNER v. CHARTERER OR MERCHANT.

In this action the shipowner sues the charterer for not loading, or for demurrage, or for freight. A shipowner may sue shipper for contributions to general average.

In an action *for not loading*, the plaintiff must prove his own compliance with warranties or conditions.

The description of a ship in a charter party is a warranty, but a statement of tonnage is not.

The merchant undertakes to load and unload within a certain number of days, called *lay days*, with liberty to delay the ship for a longer specified period on payment of a daily sum, which, as well as the delay itself, is called demurrage. If the charter party contains a fixed number of demurrage days as well as lay days, and the ship is, by the fault of the merchant, delayed beyond them both, that is called *detention*, and is to be compensated for by damages. When no demurrage days are mentioned, all detention beyond the lay days is demurrage.

See *Lord* v. *Davidson*, 13 S. C. R. 166.

Freight is regulated by the contract, or, if none, by a *quantum meruit;* if part accepted, a contract to pay *pro rata* may be inferred.

Measure of damages for not loading a cargo is the amount of freight which should have been carried, deducting expenses and any profit earned during the time covered by the charter.

Smith v. *M'Guire*, 3 H. & N. 554.

In addition to his remedy by action, the shipowner has a lien on goods for freight. If it appears on the bill of lading that freight has been paid, the owner is estopped from claiming it.

Howard v. *Tucker*, 1 B. & A. 712.

There are certain implied contracts on part of shippers, such as not to put on board without notice dangerous or corrosive matter; on part of shipowner, that the vessel be fit.

Brass v. *Maitland*, 6 E. & B. 470.

MERCHANT v. MASTER OR SHIPOWNER.

Master as well as owner is liable as a common carrier. Same Common Law exceptions as land carrier and as mentioned in bill of lading. As to these latter, the *causa causans*, not *causa proxima*, is to be looked to.

See *Hamilton* v. *Pandorf*, 12 App. Cas. 518.

The plaintiff must prove readiness and willingness to ship.

McKenzie v. *Dancey*, 12 A. R. 319.

There are certain implied contracts on the part of the shipowner or master.

The master impliedly contracts that his vessel shall be fit for the purpose of carrying the goods. She must therefore be seaworthy when she starts on her voyage.

As to damages where contract broken, see

McEwan v. *McLeod*, 9 A. R. 239.

Where there is no stipulation as to time, the master must sail in a reasonable time, and proceed without deviation to the destined port; otherwise he will be liable to the plaintiff for any loss occasioned by the delay, or for any loss, whether by perils of the sea or otherwise, occurring during the deviation, unless the defendant can prove that the loss must have happened had there been no deviation.

Deviation is justifiable to save life, but not merely to save property.

Scaramanga v. *Stamp*, 5 C. P. D. 295.

The master is bound to deliver to consignee or order of shipper on production of bill of lading and payment of freight and other lawful charges. What is a suffi-

cient delivery depends upon the contract or upon the custom and usage of the port.

Mere delivery at a wharf, and then leaving them without notifying the arrival to the consignee, is not sufficient, and the responsibility continues until actual delivery to a person appointed to receive, or something equivalent to it.

Hately v. *Merchants' Despatch*, 12 A. R. 201.

As to salvage,

International Wrecking Co. v. *Lobb*, 11 O. R. 408.

ACTION ON GUARANTEE.

A guarantee is a contract to answer for the payment of a debt or performance of a duty by another person.

A contract of suretyship arises also by the law merchant between drawer and indorsee, and between indorser and subsequent holders.

A question often arises as to whether the guarantee is confined to one transaction, and is at an end when credit has once been given to the amount guaranteed, or whether it continues in respect to credit given or debts contracted from time to time.

The tendency of the Courts is now to construe guar-

antees as continuing until revoked. It is generally a question of intention.

Plaintiff must prove default of principal debtor against which he has been guaranteed. Admissions made by principal debtor, or a judgment or award obtained against him by plaintiff, are not evidence against the surety.

DEFENCE.

By the Statute of Frauds, 29 Car. II. c. 3, s. 4, no action can be brought on a guarantee "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

By R. S. O. 1887, c. 123, s. 8, the consideration need not appear in writing.

The surety may rely on the concealment of material particulars by the principal at the time the contract was made. On the other hand, the creditor is not bound to communicate every circumstance calculated to influence the discretion of the surety.

Any alteration by a binding agreement in the relative position of the creditor and principal debtor, whereby the latter is released, or the remedy against

him is suspended, or the risk of the surety varied without the surety's assent, will be a discharge of the guarantee.

Crathern v. *Bell*, 45 U. C. R. 473.
Richard v. *Stillwell*, 8 O. R. 511.

ACTION ON WARRANTY.

The most frequent cases in which an action is brought on a warranty are on the occasion *of a sale of goods*, and of *a representation of authority to enter into a contract on behalf of another person.*

WARRANTY ON SALE OF CHATTELS.

If a man sells goods affirming them to be his own, that amounts to a warranty of title.

There is in general no implied warranty of title any more than of quality on the bare sale of a personal chattel.

Morley v. *Attenborough*, 3 Ex. 500.

In order to make a seller of personal property liable for a bad title there must be shown fraud, or express warranty, or an equivalent to it by declaration, or conduct, or usage of trade.

Bagueley v. *Hawley*, L. R. 2 C. P. 625.

As to *warranty of quality*, the following classes of sales show in what cases there is an implied warranty of quality:

1. Where the goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect is latent and not discoverable on examination, at least where the seller is neither the grower nor manufacturer.

Parkinson v. *Lee*, 2 East 314.

2. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which may be ascertained by either party, there is no implied warranty.

Barr v. *Gibson*, 3 M. & W. 390.

3. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

Chanter v. *Hopkins*, 4 M. & W. 399.

4. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or

in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied.

Brown v. *Edgington*, 2 M. & Gr. 279.

5. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article.

Laing v. *Fidgeon*, 4 Camp. 169.

6. Where the contract is to supply goods of a specified description, which the buyer has had no opportunity of inspecting, the goods must not only in fact answer the specific description, but must also be merchantable or saleable under that description.

Bigge v. *Parkinson*, 7 H. & N. 955.

And, even although the buyer has inspected the bulk, the goods must answer the specified description.

Josling v. *Kingsford*. 13 C. B., N. S. 447.

Where a horse or other article has been sold warranted, but is not in fact according to the warranty, the purchaser may maintain an action upon the war-

ranty. In some cases he may rescind the contract and recover the money paid. It is only where there is a condition in the contract authorizing the return of the chattel, or where the vendor has received it back and thereby rescinded the contract, or has been guilty of a fraud which avoids the contract, that the purchaser may thus recover back the price.

Frye v. *Milligan*, 10 O. R. 509.

Where there is a breach of the warranty and no condition for rescinding the sale, the vendee must keep the article and rely upon a cross action or counter claim, or prove the breach in reduction of damages when sued for the price.

Where there is no written contract and the warranty is mentioned in the receipt for purchase money, the sale and warranty may be proved by production of receipt. A sale for $40 and upwards is within the Statute of Frauds; but as breach of warranty is not usually discovered till after delivery and acceptance of goods sold, that statute is then complied with, and contract may be proved by oral evidence.

The plaintiff must, in general, prove an express warranty. Generally, a representation made at the sale is part of the contract and equal to a warranty. Not if the contract is reduced to writing.

The plaintiff must prove unsoundness at time of sale.

Eaves v. *Dixon*, 2 Taunt. 343.

If a horse has been returned, the plaintiff will be entitled to recover whole price; if kept, difference between real value and price.

Or, plaintiff may sell horse for what he can get, and recover residue of price paid in damages.

Caswell v. *Coare*, 1 Taunt. 566.

In the case of the second kind of action on warranty, viz., *action on the occasion of a representation of authority* to enter into a contract on behalf of another person, the general principle applies that where A contracts for B, as agent, he is liable if he is really principal, or if there is no B in existence.

If A *bona fide* but falsely represent to plaintiff that he is authorized by B to order goods, and plaintiff fail in action against B for want of such authority, he may recover value and costs of former action in an action against A.

Randell v. *Trimen*, 25 L. J., C. P. 307.

ACTION ON PROMISE OF MARRIAGE.

To maintain this action the plaintiff must prove the contract and promise of the defendant. The promises

must be mutual, the reciprocity constituting the consideration.

To prove the breach of the promise, evidence must be given either that the defendant has married another person, so that performance is no longer possible, or that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant.

The financial position of the defendant is evidence on the question of damages, and not merely the loss of an establishment in life, but the injury to the plaintiff's feelings, may be considered by the jury; and in this respect the measure of damages is different from that which is adopted in the case of other contracts. As to evidence of parties in this action,

See R. S. O. 1887, c. 61, s. 6.
McLaughlin v. *Moore,* 10 P. R. 326.

As to corroborative evidence, see

Costello v. *Hunter,* 12 O. R. 333.
Yarwood v. *Hart,* 8 C. L. T. 296.

Where defendant sets up general immodesty, plaintiff may, in first instance, give general evidence of good character, but not if there is a specific charge of immoral acts.

Jones v. *James,* 18 L. T., N. S. 243.

DEFENCE.

Immodesty or depraved conduct subsequently discovered.

To show general bad character of plaintiff, evidence of general reputation is admissible.

Foulkes v. *Sellway*, 3 Esp. 236.

Material misrepresentation of circumstances.

ACTION ON AN AWARD.

See R. S. O. 1887, c. 53, s. 1.

An action on an award is the only way of enforcing it where the submission cannot be made a rule of Court, *e.g.*, parol.

Plaintiff must prove submission and award, and performance by himself of any conditions precedent put in issue.

Where submission is by a Judge's order, which has been made an order of Court, it is sufficiently proved by production of office copy of latter order, but not where submission is by deed or written agreement.

It is necessary to prove the submission of all parties to arbitration, for without such proof it does not ap-

pear that the arbitrator had competent authority to decide between the parties.

If time for making award has been enlarged, and award made within enlarged time, plaintiff must show that enlargement was duly made, according to terms of submission, or by consent or under power of statute.

If the award be by an umpire, or by the arbitrators and an umpire, the appointment of the latter must be proved.

Still v. *Halford*, 4 Campbell 19.

Unless the submission requires it, attestation is unnecessary; and in general, therefore, an award may be proved like any other deed or writing, namely, by proof of the arbitrators' handwriting.

DEFENCE.

Corruption or misconduct of the arbitrators is not matter of defence, at least where application might have been successfully made to the Court to set the award aside. Nor can the award be impeached on the ground that the decision of the arbitrator has proceeded on a mistake.

Johnson v. *Durant*, 2 B. & A. 925.
See *Moore* v. *Buckner*, 28 Ch. 606.

ACTION ON SOLICITOR'S BILL.

See R. S. O. 1887, c. 147, s. 31.

As to special circumstances, see sec. 34.

Payment not to preclude taxation, etc., see sec. 46.

Plaintiff must prove:

1. His retainer as solicitor by the defendant, which may be done either by showing an express retainer, or that the defendant attended at his office and gave directions, or in other ways recognized his employment.

See *re Allison*, 12 P. R. 6.

2. That business was done, which may be proved by clerk or other agent who can speak to the existence of the cause or the business in respect of which the charges were made, and can prove the main items.

In an action against an ordinary corporation a retainer under seal must be proved, but not in the case of commercial companies incorporated by Act of Parliament.

Now an agreement may be made for payment by a gross sum.

R. S. O. 1887, c. 147, s. 51.

3. Delivery of bill, at least one calendar month before commencement of action.

The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered. It is enough to prove that a bill of fees, subscribed or enclosed in a signed letter, was duly delivered, and the defendant may show that it was not a *bona fide* compliance with the Act.

DEFENCE.

Special defences are: Non-delivery of bill, disputed charges, negligence or misconduct of plaintiff, want of certificate, admission, etc., Statute of Limitations.

See R. S. O. 1887, c. 147, ss. 21, 23, 24 and 26.

It is only after expiration of a year that the reference to taxation at request of party chargeable is not grantable of course.

As to agency business, if the solicitor ordering it does not expressly say he does not intend to be personally liable, he becomes personally liable.

ACTION AGAINST SOLICITOR FOR NEGLIGENCE.

In general, a solicitor is liable for ignorance or non-observance of rules of practice; for want of care in preparation of cause for trial, or of attendance thereon

with his witnesses; for mismanagement of case so far as so much of the conduct as is usually allotted to solicitors.

He is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or such as are usually entrusted to counsel.

Godefroy v. *Dalton*, 6 Bing. 467.

Action is maintainable, though damages be only nominal.

Godefroy v. *Jay*, 7 Bing. 413.

DEFENCE.

Statute of Limitations runs from breach of duty complained of.

ACTIONS BY MEDICAL PRACTITIONERS.

By R. S. O. 1887, c. 148, s. 39, every person registered under that Act shall be entitled, according to his qualification or qualifications, to practise medicine, surgery or midwifery, or any of them, as the case may be, in the Province of Ontario, and to demand and recover in any Court, with full costs of suit, reasonable charges for professional aid, advice and visits, and the costs of any medicine or other medical or surgical appliances rendered or supplied by him to his patients.

By section 40 of this Act no duly registered member of the College of Physicians and Surgeons of Ontario shall be liable to any action for negligence or malpractice, by reason of professional services requested or rendered, unless such action be commenced within one year from the date when, in the matter complained of, such professional services terminated.

DEFENCE.

If the defendant has received no benefit on account of the plaintiff's want of skill, the latter cannot recover.

Kannen v. *M'Mullen*, Peake 59.

ACTIONS FOR WAGES AND WRONGFUL DISMISSAL.

See R. S. O. 1887, c. 139.

In an action by servant for wages, plaintiff must prove a hiring, of which service will be evidence, the length of time of service, and the amount of wages due.

A dismissed servant may, and if he can ought to, enter into another service.

DEFENCE.

Misconduct, previous recovery of damages in action for wrongful dismissal.

See *McEdwards* v. *Ogilvie Milling Co.*, 7 C. L. T. 26; also 8 C. L. T. 150.

ACTION FOR NOT ACCEPTING GOODS.

The plaintiff must prove:

1. The contract.

2. The performance of all conditions precedent on his part.

3. The refusal to receive.

4. The amount of damage.

It is most commonly in this action that the question as to the validity of contract of sale without writing arises.

On a contract of sale the obligations of the buyer are:

1. To accept the article sold.

2. To pay the price.

The precise time of the change and vesting of the property and the risk of loss are also questions incidental.

In an action for not accepting goods, the difference

between the contract price and the market price on the day the contract was broken is an ordinary measure of damages.

DEFENCE.

Denial of contract. C. R. 413.

Repudiation of goods.

In the case of sales by sample, if the bulk does not correspond, the defendant may refuse to receive it, and may keep the article a reasonable time to examine and then repudiate it.

There is a distinction made between the sale of a specific article with a warranty and an executory contract for the supply of goods of a particular quality. In the last case the goods may be refused or returned, if not of the kind contracted for; but in the former case the remedy is either an action by the buyer on the warranty, or proof by him in reduction of damages in an action by the vendor, unless there be not merely misrepresentation or breach of warranty, but fraud, or unless there be a condition in the contract providing for the return of the goods in such case.

Street v. *Blay*, 2 B. & Ad. 463.

A *wilful* misrepresentation by the vendor, which induced the defendant to purchase, "even with all faults," will be the ground of a good defence.

Baglehole v. *Walters*, 3 Camp. 154.

By a contract for a sale of specific goods the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties.

Gilmour v. *Supple*, 11 Moo. P. C. 551, 566.

But where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of those things shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.

Jenner v. *Smith*, L. R. 4 C. P. 270.

Where the property has passed to the buyer the vendor may sue *for goods bargained and sold*, and will be entitled to recover the whole value of the goods.

There must have been an acceptance of part, or part payment, or earnest, or a note or memorandum in writing within the Statute of Frauds.

ACTION FOR NOT DELIVERING GOODS.

On a contract of sale the obligations of the seller are:

1. To deliver or preserve for delivery to the buyer.
2. To perform warranties, express or implied.
3. Neither wilfully to misrepresent nor fraudulently to conceal anything relating to the article sold.

In an action against vendor of goods for not delivering them, the plaintiff may be called upon to prove the contract and the breach, the performance of all conditions precedent on his part (principally readiness to receive and to pay), and the amount of damages.

In support of averment that plaintiff was ready and willing to accept the goods and pay for the same, a demand of the goods is sufficient evidence.

Wilks v. *Atkinson*, 1 Marsh. 412.

Non-delivery depends on stipulations of contract. If no place is named, the buyer must fetch the goods.

Where goods are to be delivered at a future day, the damages for breach of contract are the difference between the contract price and the market price of the goods at the day when they ought to have been delivered.

See *Hendrie* v. *Neelon*, 12 A. R. 41.

DEFENCE.

Statute of Frauds. Want of readiness of plaintiff to accept. Insolvency.

ACTION FOR GOODS SOLD AND DELIVERED.

Plaintiff must prove:

1. Contract of sale.
2. Delivery of goods according to contract.
3. Value or price.

Statute of Frauds not so often brought in here, because generally the delivery on which the action is founded amounts to receipt and acceptance, though not necessarily.

In general, proof of the delivery of the goods to and receipt of them by the defendant is *prima facie* evidence of the contract, and supersedes the proof of an order; but this may be rebutted, as by proof that the defendant was in the habit of selling such goods for the plaintiff on commission.

Miller v. *Newman*, 4 M. & Gr. 646.

In some cases where goods have been wrongfully taken, the plaintiff may waive the tort and sue on the implied contract. Then he must show a title to the property.

Lee v. *Shore*, 1 B. & C. 94.

A party cannot maintain this action unless he has either delivered the goods or done something equivalent to delivery.

Smith v. *Chance*, 2 B. & A. 755.

In the action for not accepting goods in cases on written contracts, proof must be given that the requisites of the Statute of Frauds as to acceptance have been observed. In this action what is required is proof of *delivery*. The facts which constitute a delivery are not the same as the facts which constitute an acceptance; *e.g.*, an acceptance and receipt of part satisfies the statute as to the whole, but is not a delivery of the whole for the purpose of this action.

To maintain this action, delivery to a carrier may be sufficient, though not to dispense with a written contract, for he has no authority as carrier to accept.

Meredith v. *Meigh*, 2 E. & B. 364.

Delivery may be made to a third person at the defendant's request.

Where the contract has been made with an *agent* and delivery to him, the seller may in some cases resort to the principal. Where the principal is unnamed or unknown at the time of sale, the following has been laid down as the rule:—"If a person sells goods, supposing

at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison* v. *Gandassequi*, 4 Taunt. 574, and *Paterson* v. *Gandassequi*, 15 East 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made an election at the time when he had the power of choosing between the one and the other."

Thomson v. *Davenport*, 9 B. & C. 78, 2 Sm. L. Cas.

The fact of the principal's name being disclosed at the time of the sale does not, until the seller has elected to charge the agent, prevent his resorting to the princi-

pal; such disclosure merely enables the seller to charge the principal in the first instance if he so desire.

Calder v. *Dobel*, L. R. 6 C. P. 486.

When the seller elects to sue an undisclosed principal, it is a good defence if the defendant show that he has paid his agent, and the books of the seller cannot be admitted as evidence for him that he always debited the principal.

Smyth v. *Anderson*, 7 C. B. 21.

Where the seller has sued the agent to judgment he cannot, although he has not received satisfaction, afterwards proceed against the principal.

Priestly v. *Fernie*, 3 H. & C. 977.

Goods delivered in pursuance of an order by one *partner* are delivered to all, unless it appear that they were delivered on the exclusive credit of one only.

Bottomley v. *Nuttall*, 5 C. B., N. S. 122.

A question sometimes arises in such actions, whether all the defendants are liable as partners.

A *joint stock company* is in the nature of a partnership. When incorporated the direct liability of individual members ceases. A question frequently arises, What is the liability of persons who have become sub-

scribers to a company projected but not finally established?

Where a husband gives his wife express authority to pledge his credit, she becomes his agent.

As to implied authority, see *Manby* v. *Scott*, and other cases, 2 Smith L. Cas.

Where a wife is living separate, it lies on the plaintiff to show that she does so under circumstances which imply an authority to pledge her husband's credit.

Johnston v. *Sumner*, 3 H. & N. 261.

The plaintiff must prove either that the defendant and the woman to whom the goods are delivered are married, of which it is sufficient *prima facie* evidence that they are living together, or that she and the defendant cohabited, and that she passed as his wife with his assent, assumed his name, and lived in his house as part of his family.

Car v. *King*, 12 Mod. 372.
Watson v. *Threlkeld*, 2 Esp. 637.

The father of an *infant* to whom goods are supplied is only liable where an actual authority from him to his child is proved, or circumstances appear from which such an authority can be implied.

Rolfe v. *Abbott*, 6 C. & P. 286.

Where goods sold without any agreement as to price, *value* must be proved.

DEFENCE.

Action brought before credit expired.

In calculating the time of credit the day of the sale must be excluded.

Webb v. *Fairmaner*, 3 M. & W. 473.

ACTION FOR WORK AND MATERIALS.

The plaintiff's proofs are:

1. The contract, express or implied.

2. The performance of the work or supply of materials (if any).

3. The value (if remuneration not ascertained by contract).

Where there was a special agreement, terms of which had been performed, it raised a duty for which an *indebitatus assumpsit*, or common counts, lay.

If contract not executed, and plaintiff has been prevented from executing it by absolute refusal of defendant to perform his part of it, or by an act done by the defendant which has incapacitated plaintiff from

performing it, the plaintiff may rescind contract and sue on a *quantum meruit.*

Planché v. *Colburn,* 8 Bing. 14.

If there is a special agreement, and work done and adopted by the defendant, though not strictly pursuant to such agreement, the plaintiff may recover on a *quantum meruit.*

Burn v. *Miller,* 4 Taunt. 745.

The defendant may refuse to pay for the subject-matter where it deviates, and in such cases the plaintiff cannot recover even on a *quantum meruit.*

Ellis v. *Hamlin,* 3 Taunt. 52.

To fix a defendant with *extras,* the acceptance and adoption ought to be under circumstances which imply approval and waiver of the deviation, and make it practicable to repudiate.

Architect's certificate. Apart from fraud, the wrongful withholding by surveyor of certificate affords no ground of action.

See *Badgley* v. *Dickson,* 13 A. R. 494.

As to when a claim for work and labour, and when one for goods sold and delivered, is applicable, the rule is laid down in *Atkinson* v. *Bell,* 8 B. & C. 277. The power of amendment renders the distinctions less ma-

terial than they were; but if the claim is not properly made for work and materials, but for not accepting a chattel, it may be defeated by a defence under the Statute of Frauds.

See *Wolfenden* v. *Wilson*, 33 U. C. R. 442.

If there is a deviation from the terms of contract, the plaintiff must prove assent of defendant to the deviation.

DEFENCE.

The following are good:

That work was done under special contract not executed.

That defendants, being a corporation, did not contract, or sufficiently contract, under seal.

That defendants received no benefit from work, it having been improperly executed by plaintiff.

See *Campbell* v. *McKerricher*, 6 O. R. 85.

In action for non-performance of contract to do work, plaintiff must show willingness and readiness on his part to perform, and on the defendant's part a distinct and unequivocal refusal, and that such refusal was acted upon by plaintiff.

McLellan v. *Winston*, 12 O. R. 431.

ACTION FOR MONEY PAID.

Plaintiff must prove:

1. The payment of money by the plaintiff.

2. That it was paid at request of defendant, and to his use.

The payment must be proved as a fact. The admission of the payee is not admissible against the defendant, unless the payee were the agent of the defendant for the purpose of making the admission.

The plaintiff must prove that money was paid, and the money paid was *his* money.

As to request, a legal obligation for another's debt will be equivalent to a previous request, as where one person is a surety for another, and is called upon to pay, the money paid may be recovered, though not paid by desire of principal.

Exall v. *Partridge*, 8 T. R. 310.
McNab v. *Wagstaff*, 5 U. C. R. 588.

Where several are sureties, and one is compelled to pay the whole, he may recover in this action from each of his co-sureties a rateable proportion of the moneys so paid.

Deering v. *Winchelsea, El.* 2 B. & P. 270.
Geary v. *The Gore Bank*, 5 Chy. 536.

This action does not lie for contribution or indem-

nity against a person jointly engaged with the plaintiff in doing a wrongful act by which the plaintiff is put to expense.

Merryweather v. *Nixan*, 8 T. R. 186.

To support this action it must appear either that the defendant was primarily liable to the third party to pay the money, or that it was paid, or the liability incurred by the plaintiff at his express or implied request, or on his guarantee.

Brittain v. *Lloyd*, 14 M. & W. 762.

The indorser of a bill, who has been sued by the holder and paid the amount, cannot recover the costs of the former action, for the custom of merchants does not make an acceptor liable for the costs of actions against subsequent holders.

Dawson v. *Morgan*, 9 B. & C. 618.

ACTION FOR MONEY LENT.

In an action for money lent, the plaintiff will have to prove the loan of his money.

It is not sufficient to prove merely the payment of money to the defendant; for in such a case the presumption is that the money is paid in liquidation of an antecedent debt.

When a parent advances money to a child it is presumed to be a gift.

A loan of money secured by mortgage is recoverable as money lent if there is no covenant to pay the amount. Where a simple loan of money is secured by a covenant to repay the money, the creditor's only remedy is on the covenant. It is a defence that a simple contract has been subsequently merged. As an amendment would now be allowed, this distinction is not so important.

Re Ross, 29 Chy. 385.

ACTION FOR MONEY HAD AND RECEIVED.

The plaintiff must prove the receipt of the money by the defendant, and his own title to recover it as received for him.

The plaintiff must prove that money has been received. He must give evidence of some particular sum.

Baxendale v. *G. W. R. Co.*, 32 L. J., C. P. 225.

The plaintiff must prove that it was his money, or that the money has been received to his (plaintiff's) use by defendant.

Where money has been paid on a consideration which

has wholly failed, it may be recovered in this action by the party who paid it.

Conduct money received with a subpœna may be recovered by the party who paid it, where the attendance of the witness has been countermanded and he has incurred no expense.

See *U. S. Exp. Co.* v. *Donohoe*, 14 O. R. 333.
Martin v. *Andrews*, 7 E. & B. 1.

Where a party paying money upon a forged instrument has not been guilty of any want of that caution which, on account of the character he fills, he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover the money as money paid under a mistake.

Money paid under mistake of law cannot in general be recovered.

Chesney v. *St. John*, 4 App. R. 150.
Clark v. *Eckroyd*, 12 App. R. 425.

In this case, held, that demand for repayment or notice of mistake necessary before action.

See *Freeman* v. *Jeffries*, L. R. 4 Ex. 189.

The plaintiff can only rescind a contract on the

ground of fraud when he can disaffirm the contract and remit the defendant to his former state.

Urquhart v. *Macpherson*, 3 App. Ca. 821.

Money paid under mistake of fact can be recovered. See *The Law Soc'y, U. C.* v. *City of Toronto*, 25 U.C.R.199.

Money obtained by fraud can be recovered.

McMaster v. *Geddes*, 19 U. C. R. 216.

Where a man has been obliged involuntarily and by wrongful duress to pay, the money may be recovered.

Where an action is brought and a person pays the demand "without prejudice," he cannot recover the money so paid.

Brown v. *McKinally*, 1 Esp. 279.

Money recovered by regular legal process, though in fact not due, cannot be recovered in this action.

Marriot v. *Hampton*, 7 T. R. 269.

A wrongful receipt by the defendant of the proceeds of goods wrongfully sold may be treated as a receipt to the plaintiff's use by waiving the tort.

Lythgoe v. *Vernon*, 5 H. & N. 180.

Money stolen by the defendant from the plaintiff constitutes a debt from defendant to plaintiff.

See *Wells* v. *Abrahams*, L. R. 7 Q. B. 554.

Money paid on illegal contracts is recoverable:

1. When the contract is executory, and the plaintiff and defendant are *in pari delicto.*

2. Money is recoverable from a stakeholder in whose hands it has been deposited on an illegal consideration, though executed by the happening of the event upon which a wager is made.

3. The money is recoverable though the contract be executed, if the plaintiff be not *in pari delicto* with the defendant.

4. Money is not recoverable where the contract is executed and plaintiff is *in pari delicto.*

ACTION ON AN ACCOUNT STATED.

The plaintiff must prove an absolute acknowledgment; a qualified acknowledgment is not sufficient.

See *McKay* v. *Grinley,* 30 U. C. R. 54.
Green v. *Burtch,* 1 C. P. 313.

An I O U is evidence of an account stated with the person who holds it; and if another person was meant, the defendant must prove it.

Fesenmayer v. *Adcock,* 16 M. & W. 449.

ACTIONS AGAINST CARRIERS.

Carriers may be of goods or of persons, or of both, and they may be carriers by land and by sea.

A common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as see fit to employ him. He is bound at Common Law to receive and carry all goods reasonably offered to him, and for which the person bringing the goods is ready and willing and offers to pay reasonable hire and reward.

Pickford v. *Grand Junction Ry. Co.*, 8 M. & W. 372.

He is also an insurer of the goods against all accidents, except the act of God or the Queen's enemies, and whether the loss occurs by accident, robbery, violence, or the negligence of third persons.

A carrier may limit generally his business to certain goods, and is then not obliged to carry other goods.

Johnson v. *Midland Ry. Co.*, 4 Ex. 367.

Where the carrier delivers a ticket or other notice to the person from whom he receives the articles, specifying the terms on which he agrees to carry, and the customer assents, or does not dissent, the terms of the notice will establish a special agreement, and will exclude the Common Law contract so far as it is varied by those terms. If the customer in such a case declines the terms, and wishes to fix the carrier with the Common Law liability, he must tender or offer a reason-

able compensation, and sue for the refusal to receive the goods.

Garton v. *Bristol*, 30 L. J. Q. B. 273.

By section 104 R. S. C. c. 109, *The Railway Act*, passengers and goods must be conveyed on due payment of the toll, freight or fare lawfully payable therefor. Tolls are provided for by section 16 of the Act. See also *post*, "Negligence of Railway Companies," under "Negligence."

Every person aggrieved by any neglect or refusal to convey has an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company, or of its servants.

Provisions are made for interchange of traffic between companies by section 56.

As to liability of carriers by water, see R. S. C. c. 82.

Goods that are brittle or liable to injury must be safely packed by the consignor, or the carrier will not be liable for injury done to them in carrying if he has used due care.

Hart v. *Baxendale*, 16 L. T., N. S. 390.

In an action *for loss of or injury to goods*, the plaintiff must prove:

1. That the defendant is a common carrier.

2. The delivery of the goods for conveyance and the contract, if special.

3. The loss or injury.

4. The damage.

In an action *for refusal to carry*, the plaintiff will have to prove, besides the defendant's character as a common carrier, the tender of goods for conveyance and the refusal of the defendant to accept the goods for that purpose, although the plaintiff was then ready and willing to pay a reasonable reward in that behalf. The action is one of tort for refusal to perform a public duty, whereby the plaintiff has sustained special damage.

The plaintiff need not aver a strict tender of the fare; it is enough that he was ready to pay. But where the carrier has limited his liability unless a certain charge be paid, payment or tender of that charge must be proved.

Wyld v. *Pickford*, 8 M. & W. 443.

The proper person to sue as plaintiff is the person in whom the property was vested when lost or damaged. Hence generally the consignee is the proper plaintiff.

The measure of damages is the market value of the

goods at the time and place at which they ought to have been delivered; and if there is no market for the sale of such goods at the place, the jury must ascertain their value by taking their price at the place of manufacture, together with the cost of carriage and a reasonable sum for importer's profits.

Vickers v. *Wilcocks*, 2 Sm. L. Cas. 805.

LETTER CARRIERS.

Postmaster-General is not a common carrier, but postmasters are liable for their own personal negligence.

PASSENGER CARRIERS.

Carriers of passengers are not insurers of the person, and are responsible only for want of due care.

Christie v. *Griggs*, 2 Camp. 81.

If a company allege that the passenger has not complied with the conditions of a by-law, they must prove that they have strictly observed the by-law on their part.

If, in consequence of wrongful delay or erroneous information of carrier, passenger is reasonably obliged to hire another conveyance or stop a night on the road, the expenses may be recovered, but the jury

cannot give general damages for loss of time, trouble, etc.

Hobbs v. *L. & S. W. R. Co.*, L. R. 10 Q. B. 111.

PASSENGERS' LUGGAGE—LIABILITY THEREFOR OF COMMON CARRIERS.

On this point see *Stewart* v. *London & N. W. Ry. Co.*, 3 H. & C. 135, where it was said that a carrier undertakes no responsibility in respect of the goods of a passenger beyond that which he undertakes with respect to the passenger himself. In other cases it has been ruled that a carrier of passengers is liable to the ordinary obligations of common carriers.

ACTION AGAINST INNKEEPERS.

Generally, an action *ex contractu* for some breach of the contract, express or implied, which the innkeeper has entered into, or professes to be ready to enter into with his guest in relation to his personal entertainment.

Newcombe v. *Anderson*, 11 O. R. 665.

An innkeeper at Common Law is answerable for the safe keeping of the goods of a guest, but it is only in respect of the goods of a guest that he is so liable.

The Common Law liability has been limited by R. S. O. 1887, c. 154, s. 3.

By section 2 of that Act an innkeeper has a lien on the baggage and property of his guest for accommodation furnished, and has the right to sell the same after three months on giving one week's notice by advertisement.

ACTION AGAINST PAWNBROKERS.

By R. S. O. 1887, c. 155, s. 1, every person who takes or receives by way of pawn, pledge or exchange, any goods for the repayment of money lent thereon, shall be deemed a pawnbroker within the meaning of that Act.

When goods are pawned with a pawnbroker, a written or printed memorandum must be given to the person pawning, containing a description of the goods, the amount advanced, the date, and names and residence of the parties. The holder of this memorandum is, on presentation thereof and demand, entitled to the goods on payment of the pawnbroker's claim.

Provision is made in the statute for sale of goods, and for recovery of goods when illegally detained.

PART II

DEFENCES IN ACTIONS ON SIMPLE CONTRACTS.

In some few instances it has been necessary to point out certain special defences which may be raised to particular actions. There are, however, other defences which may be a sufficient answer to any species of action. Such latter defences may be pleaded in addition to the special defences in all cases where the special defences have been named. It is convenient to collect such defences of general application. They are presented alphabetically, more in the shape of definition than at any length. Their application to any given case will depend on the circumstances of the case. The definition of the defence will be some guide as to its applicability.

Before entering on the subject of the defences themselves it may be well to recapitulate the substance of the rules of pleading relative to defences.

First, as to *admissions:*

C. R. 400.—Each party is to admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true; or he may give notice by his own

statement or otherwise that he admits, for the purposes of the action, the truth of the case generally, or of any part of the case stated or referred to in the statement of claim or defence of the opposite or other party.

C. R. 401 provides for the manner of making admissions in pleading.

Second, as to *allegations in pleadings:*

C. R. 402.—Each party in any pleading must allege all such facts not appearing in the previous pleading, if any, as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as, if not so raised on the pleadings, would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as, for instance, fraud, or that any claim has been barred by the Statute of Limitations, or has been released.

C. R. 403.—Save as above otherwise provided,* the silence of a pleading as to any allegation contained in a pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation; and any allegation introduced for the purpose of preventing such implied admission, and not for the purpose of making intelligible the grounds of defence, is to be considered impertinent.

C. R. 413.—Where a contract is alleged in any pleading a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or of its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

C. R. 416 relates to an action for the recovery of land, and will be found at page 193.

C. R. 417.—Nothing in these rules contained shall affect the

* C. R. 410.—Facts presumed need not be stated. C. R. 411.—Denial of representative capacity of opposite party required specifically.

right of any defendant to plead not guilty by statute.* And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead, he shall not plead any other defence without the leave of the Court or a Judge.

See also C. R. 407, 408 and 409.

It is necessary to refer to these rules of pleading, because the course to be taken at the trial depends, in the first instance, on the pleadings before the Court, and the Court, under C. R. 402, will not allow a party to be taken by surprise. Therefore, while amendment is liberally allowed, the countervailing principle of C. R. 402 is frequently applied.

We now proceed with the definition of the various defences. They appear in alphabetical order.

ACCORD AND SATISFACTION.

An agreement which need not be by deed, the effect of which is to discharge the right of action possessed by one of the parties to the agreement.

See R. S. O. 1887, c. 44, s. 53 (7).
Brundage v. *Howard*, 13 Ap. R. 337.

* The plea of "not guilty by statute" puts in issue not only the defences peculiar to the statute, but all that would have arisen at Common Law; *e.g.*, in an action for excessive distress a plea of "not guilty," under 11 Geo. II. c. 19, s. 21, puts in issue not only the matter of justification, but also the tenancy and ownership of the goods. The words "by statute," together with the reference to the statute, must appear in the margin of the statement of defence.

Compare cases of

Loomer v. *Marks*, 11 U. C. R. 16.
Brown v. *Jones* 17 U. C. R. 50.
Paisley v. *Broddy*, 11 P. R. 202.

ALTERATION.

Leading case, *Pigot's Case*, 11. Rep. *Held*,

1. An immaterial alteration by a stranger does not avoid a deed.

2. If made by a party interested, the alteration will avoid as against him, whether material or not.

3. A material alteration by a stranger avoids it.

The second resolution in Pigot's case was dissented from in *Aldous* v. *Cornwall*, L. R. 3 Q. B. 573; and it is the rule that an alteration which has no effect on the liability of either party, as stated in the contract, will not vitiate the instrument.

As to the third resolution, it has also been questioned. As to whether a material alteration by a stranger would avoid an instrument or not would depend on whether the plaintiff was responsible for the custody of the document.

Sayles v. *Brown*, 28 Chy. 10.
Sommerville v. *Rae*, 28 Chy. 618.

FRAUD.

The fraud must be some concealment or deception practised by the plaintiff with respect to the very transaction in question; the illegality of the transaction from other reasons is not sufficient.

Green v. *Gosden*, 3 M. & Gr. 446.

Fraud means moral fraud, and not merely an innocent misrepresentation.

Panama Mail Co. v. *Kennedy*, L. R. 2 Q. B. 580.
Moens v. *Hayworth*, 10 M. & W. 147.
Burrows v. *Leavens*, 29 Chy. 479.

FRAUDS, STATUTE OF.

This defence has been specially referred to under the headings, "Action on Sale of Real Property," "Action on Guarantee," and "Action for not Accepting Goods."

Rule now is that if legal part of contract in question can be severed from that which is illegal, the former will stand good, whether the illegality exist by statute or Common Law.

Kitching v. *Hicks*, 6 O. R. 739.
Cameron v. *Cameron*, 7, C. L. T. 334.

ILLEGALITY.

Where a contract is illegal or immoral it cannot be enforced.

The maxim of *in pari delicto potior est conditio defendentis* is important in considering the question of illegality.

The test for determining whether or not the plaintiff and defendant were *in pari delicto* is by considering whether plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was a party.

Taylor v. *Chester,* L. R. 4 Q. B. 309.

The rules as to recovering money paid on illegal contracts have been stated under the heading, "Action for Money Had and Received."

In an action for work and labour the illegality of the transaction will be a defence. A party will not be permitted to recover either for work and labour done or materials provided where the whole combined forms one entire subject-matter made in violation of the provisions of an Act of Parliament.

Bensley v. *Bignold,* 5 B. & A. 335.

A contract which amounts to maintenance is illegal, and cannot be enforced.

Bradlaugh v. *Newdegate,* 11 Q. B. D. 1.

No action lies for goods knowingly sold for illegal purposes.

An agreement not to prosecute for a criminal offence is illegal; but unless given in pursuance of such an agreement, securities given to a creditor by a debtor whose debt has been contracted under such circumstances that might have rendered him liable to a prosecution may be enforced.

Flower v. *Sadler*, 10 Q. B. D. 572.
Davis v. *Hewitt*, 9 O. R., 435.
Summerfeldt v. *Worts*, 12 O. R. 48.

R. S. O. 1887, c. 203, *An Act to Prevent the Profanation of the Lord's Day*, prevents sales or ordinary work on Sunday. By section 8 all sales and agreements made on Sunday are void.

The English Act on the same point is 29 Charles II. c. 7. A farmer does not come within the provisions of this statute.

The Queen v. *Silvester, et al.*
33 L. J. M. C. 79 Q. B.
See *Crosson* v. *Bigley*, 12 A. R. 94.

All contracts in restraint of trade are bad, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject of contract.

See *Mitchell* v. *Reynolds*, 1 Sm. L. C.

One who is a party to an immoral contract cannot enforce it.

INFANCY.

Infancy is a good defence, unless the action be for necessaries. The question of what are necessaries is to be governed by the fortune and circumstances of the infant, and the proof of those circumstances lies on the plaintiff. A contract by an infant other than for necessaries is voidable only, not void, and may be ratified by him after he attains his majority. The ratification, to be good, must be in writing.

R. S. O. 1887, c. 123, s. 6.

May be proved by calling any person who can speak as to the time of birth, or by declarations of deceased members of family.

Extracts from the records of the Registrar-General of the Province, under R. S. O. 1887, c. 40, s. 23, are *prima facie* evidence of the facts therein stated.

If defendant of age when action commenced, the date of contract must be shown as well as fact of non-age.

INSANITY.

The contracts of a lunatic, entered into fairly and *bona fide* with a person ignorant of the incapacity, where the transaction is in the ordinary course, and

wholly or in part executed, are valid. Insanity, and the probable knowledge of it by the opposite party, may be proved by showing that it existed and was apparent either shortly before or shortly after the alleged contract.

Beavan v. *M'Donnell*, 9 Ex. 309.

INTOXICATION.

A contract entered into by a person in a state of intoxication is voidable, not void.

Matthews v. *Baxter*, L. R. 8 Ex. 132.

LIMITATIONS, STATUTE OF.

The statutes relating to limitation of actions in Ontario are: R. S. O. 1887, c. 60 and c. 111; Statutes 21 James I. c. 16; 4 and 5 Anne c. 16.

Upon issue joined on this defence burden of proof lies on plaintiff.

Time of limitation is to be computed exclusive of day on which cause of action arose.

Statute runs from time of breach of promise or contract, and not discovery of it. In case of fraudulent concealment, from its discovery.

A note payable on demand is payable immediately, and the statute begins to run from that date.

Norton v. *Ellam*, 2 M. & W. 461.

Where the note is payable after sight, the statute runs only from the time of presentment.

Holmes v. *Kerrison*, 2 Taunt. 323.

Where the cause of action does not arise until after request made, the statute will only run from the time of such request.

Gould v. *Johnson*, 2 Salk. 422.

By 21 Jac. I. c. 16, s. 3, actions of account, and on the case (other than concerning the trade of merchandise between merchants or their factors or servants, and other than for slander) actions of debt on lending or contract without specialty, or for rent in arrear, are to be brought within six years from the cause of action, and not after.

The exception of merchants' accounts is abolished, and by R. S. O. 1887, c. 60, s. 2,

All actions of account, or for not accounting, or for such accounts as concern the trade of merchandise as between merchant and merchant, their factors and servants, must be commenced within six years after the cause of action.

Limitations of other actions are as follows:

Twenty years.

(*a*) Actions for rent upon an indenture of demise.

(*b*) Actions upon a bond or other specialty.

(*c*) Actions upon a recognizance.

Six years.

(*d*) Actions upon an award where the submission is not by specialty.

(*e*) Actions for an escape.

(*f*) Actions for money levied on execution.

Two years.

(*g*) Actions for penalties, damages, or sums of money given to the party aggrieved by any statute.

R. S. O. 1887, c. 60, s. 1.

DISABILITIES.

In case a plaintiff is, at the time of the cause of action accruing, an infant or *non compos*, the six years run from the removal of the disability.

A plaintiff resident without the limits of Ontario has no longer period of time to commence an action than if he were resident in Ontario when the cause of action accrued.

In the case of a defendant without the limits of Ontario at the time of the action accruing, the action may be brought within such times as are above mentioned after the return of the absent person to Ontario.

In cases where some joint debtors have been within

and some without Ontario, no further time is allowed to commence action against any of the joint debtors who were within Ontario when the action accrued by reason only that some other of the joint debtors were at that time without Ontario.

A judgment recovered in such a case will not be a bar to another action against the joint debtor who was without Ontario.

SUBSEQUENT ACKNOWLEDGMENT.

The effect of the Statute of Limitations may be avoided by proof of an unqualified acknowledgment of the debt within six years, which is evidence of a new promise to pay the debt, and not a mere revival of the original promise.

By the *Act respecting Written Promises and Acknowledgments of Liability*, R. S. O. 1887, c. 123, a written memorandum is required to take the case out of the Statute of Limitations.

Part payment of a debt takes a case out of the statute, as evidence of a fresh promise to pay the debt. The payment must be such as to warrant the jury in inferring an intention to pay the rest. It must appear that the payment was on account of the debt for which the action was brought, and that it was made as part payment of a greater debt.

A part payment within six years, though proved only by an oral or unsigned admission of the defendant, will take the case out of the statute.

Cleave v. *Jones*, 6 Ex. 573.

An acknowledgment, or promise, or part payment, by one of several co-contractors, does not make the co-contractor liable to lose the benefit of the statute.

R. S. O. 1887, c. 123, s. 2.

The acknowledgment or promise may be made or contained by, or in some writing signed by, the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise.

An admission of a debt made to a mere stranger can only repel the statute when it can be properly left to the jury as equivalent to or implying a promise to the plaintiff to pay him.

The construction of a doubtful document given in evidence to defeat the statute is for the Court and not for the jury, though if intrinsic facts are adduced in explanation, the facts are for the consideration of the jury.

Smith v. *Thorne* 18 Q. B. 134.

Whether the promise be qualified or not is a question of construction for the Court and not for the jury,

except where extrinsic evidence affects the construction.

Routledge v. *Ramsay*, 8 A. & E. 221.
Wilson v. *Rykert*, 14 O. R. 188.

MERGER.

The technical explanation of merger is as follows: Where a debtor gives his creditor a higher security for the debt due and co-extensive with it, the debt is merged by operation of law irrespective of the intention of the parties.

Price v. *Moulton*, 10 C. B. 561.

Under the heading of "Action for Money Lent" this defence has been alluded to, and it has been stated that the present powers of amendment render it much less available than formerly.

PAYMENT.

Most usual way of proving payment is by producing receipt. To an agent or by an agent, good.

In general, the party who pays money has a right to direct the application of it; but where money is paid to a creditor generally, without any specific appropriation to the party paying, and the creditor has several demands against the party paying, he may

apply the money paid to whichever of those demands he pleases.

Clayton's Case, 1 Mer. 572.

In some instances, and in the absence of any proof of special appropriation, the law will direct or presume the application of money paid generally.

Of this nature are accounts current with bankers and others, where there are various items of debt on one side and credit on the other, occurring at different times, and no special appropriation is made by the parties; successive payments will then be applied to the discharge of antecedent debts in the order of time in which they stand.

Kinnaird v. *Webster*, 10 Chy. D. 139.

There is a distinction between cases where payment is made by bill or note payable to bearer in exchange for goods sold at the time, and those where such a bill or note is given for a pre-existing debt. In former case, barter with risks; in latter case, not so.

The legal effect of accepting on account of a debt a bill or note not treated as cash is that of a conditional payment. It implies an agreement to suspend the remedy except in the case of specialty debts or rent, in which last cases no such implication is held to arise.

A payment may be made by mere transfer of figures in an account.

Eyles v. *Ellis*, 4 Bing. 112.

If goods be accepted in satisfaction of a debt, this constitutes payment.

Cannan v. *Wood*, 2 M. & W. 465.

RELEASE.

After breach a contract can only be discharged by release under seal or by accord and satisfaction.

Before breach it may be discharged by parol.

Release of one of two joint or joint and several debtors is a discharge of all,

Nicholson v. *Revill*, 4 A. & E. 675;

but not so the release of one co-debtor, reserving remedies against the other,

Willis v. *De Castro*, 27 L. J. C. P. 243,

or a release of the principal debtor, reserving rights against a surety.

Bateson v. *Gosling*, L. R. 7 C. P. 9.

An unqualified covenant not to sue has the effect of a release on the ground of avoiding circuity of action.

Ford v. *Beech*, 11 Q. B. 853.

Fraud can only be relied on in reply to a release contained in a contract when the plaintiff can disaffirm the contract and remit the defendant to his former state.

See *Urquhart* v. *Macpherson*, 3 Ap. Ca. 821.

RESCISSION.

Before breach a simple contract may be rescinded and discharged by a mutual oral agreement.

A deed cannot be revoked or discharged by parol or writing not under seal.

West v. *Blakeway*, 2 M. & Gr. 729.

An executory agreement in writing not under seal may, before breach, be discharged by a subsequent oral agreement. After breach it cannot be discharged except by release under seal or accord and satisfaction,

Willoughby v. *Backhouse*, 2 B. & C. 824,

or by a valid agreement, substituting a new cause of action in place of the old, for an invalid agreement will not discharge the former one.

Noble v. *Ward*, L. R. 1 Ex. 117.

A distinction is to be observed between simple contracts in writing under the Statute of Frauds and contracts at the Common Law. In the former case an

oral contract will not be admitted to show a subsequent variation in the written contract.

Goss v. *Lord Nugent*, 5 B. & A. 58.

But it is otherwise if the contract is not subject to the control of a statute. Where such a contract has been reduced into writing it is competent to the parties at any time before the breach of it, by a new contract not in writing, either altogether to waive, dissolve or alter the former agreement, or to qualify the terms of it, and thus to make a new contract, to be proved partly by the written agreement and partly by the subsequent oral terms engrafted upon it.

Goss v. *Lord Nugent*, 5 B. & A. 65.

A contract within the Statute of Frauds can, it seems, be wholly discharged orally.

Midland R. Co. v. *Ontario Rolling Mills*, 10 Ap. R. 677.

SET-OFF.

C. R. 373 is as follows:

A defendant in an action may set up, by way of counter claim against the claim of the plaintiff, any right or claim, whether the same sound in damages or not.

The distinction between a set-off and counter claim is still material for some purposes, and especially with

reference to costs. A set-off alleges a liquidated demand due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff, and shows that on the whole account between the plaintiff and the defendant nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is, therefore, a defence to the action.

A counter claim is in the nature of a cross action by the defendant, which may be made, although in respect of or against a claim for unliquidated damages.

Stooke v. *Taylor*, 5 Q. B. D. 576.

Where the defendant succeeds on a simple set-off, or on a counter claim founded on matters that would have been a defence prior to the Judicature Act, and to an amount not less than the plaintiff's claim, he has a complete defence to the action, and is therefore entitled to his costs.

See *Stooke* v. *Taylor*, *ubi sup.*

Where, however, the counter claim is in the nature of a cross action, and the plaintiff is successful on his claim, and the defendant also on his counter claim, the plaintiff is entitled, even although the defendant recover the larger amount, to the general costs of the action. The defendant is entitled to the costs of the counter claim; but there is no apportionment of such

costs as, if the claim and counter claim had been separate actions, would have been incurred in each of them.

Ward v. *Morse*, 23 Chy. D. 377.

Where the claim and counter claim are both dismissed with costs, the plaintiff pays the general costs of the action, and the defendant the amount only by which the costs have been increased by the counter claim.

Saner v. *Bilton*, 11 Chy. D. 416.
2 Geo. II. c. 22, s. 13.
8 Geo. II. c. 24, s, 45.
See *McGowan* v. *Middleton*, 11 Q. B. D. 464.

Where the issues in the claim and counter claim are the same, the plaintiff is not entitled to adduce fresh evidence to contradict the defendant's evidence.

Green v. *Sevin*, 13 Ch. D. 589.
See *Monteith* v. *Walsh*, 10 P. R. 163.
Goring v. *Cameron*, 10 P. R. 496.
Hare v. *Cawthrope*, 11 P. R. 353.
Chamberlain v. *Chamberlain*, 11 P. R. 501.
Central Bank v. *Osborne*, 12 P. R. 160.

TENDER.

The following are the main requisites for a valid tender:

The actual production of the money due is neces-

sary, unless the creditor dispense with the production of it at the time, or does anything which is equivalent to a dispensation.

Thomas v. *Evans*, 13 East 101.

There must be evidence of an unqualified offer. An offer of payment clogged with a condition that it must be accepted as the balance due does not amount to a valid tender.

Evans v. *Judkins*, 4 Camp. 156.

Whether a tender be conditional or not is a question for the jury, where the words or facts accompanying it are disputed.

Eckstein v. *Reynolds*, 7 A. & E. 80.

But if the goodness of it turns on the meaning or legal effect of a letter or writing accompanying it, then the question is for the Judge.

Bowen v. *Owen*, 11 Q. B. 130.

The same rule would apply to unwritten expressions used by the party tendering, where the tenor of them is not disputed.

The tender need not be made by the debtor himself; it is sufficient if made by his agent.

A tender to a person authorized by the creditor to receive money for him is sufficient.

Tender of a part of one entire debt is inoperative.

Dixon v. *Clark*, 5 C. B. 365.

If a man tenders more than he ought to pay, it is good.

Wade's Case, 5 Rep. 114.

But such a tender is only good where it is made in moneys numbered so that the creditor may take what is due to him; therefore, *e.g.*, a tender of a Dominion note for fifty dollars, requiring change, is not good.

By R. S. C. c. 31, *An Act Respecting Dominion Notes*, such Dominion notes are authorized. Section 4 provides:

"Such notes shall be a legal tender in every part of Canada except at the offices at which they are respectively made payable."

By R. S. C. c. 30, *An Act Respecting the Currency*, gold coins may be struck for Canada of the standard of fineness prescribed by law for the gold coins of the United Kingdom, and bearing the same proportion in weight to that of the British sovereign which $5 bears $4.86\frac{2}{3}$. These coins shall pass current and be a legal tender in Canada for $5.

Silver, copper or bronze coins are legal tender as follows: Silver coins to the amount of $10; copper or bronze coins to the amount of twenty-five cents in

any one payment. The holder of the notes of any person to the amount of more than $10 shall not be bound to receive more than that amount in such silver coins in payment of such notes if presented for payment at one time, although any of such notes is for a less sum.

The defence of tender is only applicable to cases where the party pleading has been guilty of no breach of his contract.

The defence will be defeated by showing a demand and refusal prior or subsequent to the tender.

Bennett v. *Parker,* L. R. 2 C. L. 89, Ex.

The demand must be proved of the precise sum tendered.

Rivers v. *Griffiths,* 5 B. & A. 630.
See *Demorest* v. *Midland,* 10 P. R. 640.
Lockridge v. *Lacey,* 30 U. C. Q. B. 494.
Long v. *Long,* 17 Chy. 251.

PART III.

ACTIONS ON SPECIALTIES.

The actions under this heading are as follows:

	Page
On covenants	100
For double value of land demised	117
For double rent	117
On bond	118
For penalty	119

ACTION ON COVENANTS.

A covenant is an agreement expressed in an instrument in writing executed as a deed. Such agreements after proof of the deed in which they are contained are subject to the rules of construction applicable to ordinary documents. There need be no formal words of covenant. Any words in a deed showing an agreement to do a thing make a covenant.

As land is for the most part conveyed and leased by instruments under seal, certain covenants usually

inserted in these instruments are frequently the subject of an action.

The covenants relating to land are principally:

Not to assign or sublet without leave.
As to trade on premises.
For good husbandry.
To insure.
To repair.
To pay rates and taxes.
For title.
To yield up possession of premises at end of term.

Besides the actions on these special covenants it is well to notice:

1. Some of the most material issues arising in actions on deeds and bonds generally.

2. Some of the most material issues arising in actions on leases or other conveyances of real property.

The actions on particular covenants will be considered after the above cases, 1 and 2.

1. Some of the Most Material Issues Arising in Actions on Deeds and Bonds Generally.

Under C. R. 413, quoted on page 78, the defendant may deny the making of the contract in fact. This defence now in part takes the place of the old plea of *non est factum.*

The plaintiff under this defence need only produce and prove the execution of the deed.

Where the action is not for any liquidated sum it is also necessary to prove the amount of damage.

The following are the principal rules as to the *mode of proving a deed* between private parties:

It was formerly the rule that whenever a deed or other instrument was subscribed by attesting witnesses, one of them at least must have been called to prove the execution. Now, by R. S. O. 1887, c. 61, s. 50,

"It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."

This section does not apply to cases where attestation is essential, as wills, instruments under powers, bills of sale, etc. Even in these cases the necessity for calling the attesting witness only arises where it is necessary to prove the instrument; for the parties against whom any of these instruments requiring attestation are sought to be used may waive the necessity of calling the attesting witness by admission. Where *proof* has to be given of attestation, the necessity for calling the attesting witness cannot be avoided by putting the party to the deed, and against whom

it is sought to be used, into the witness box, and extracting an admission of the execution from him.

Whynan v. *Garth*, 8 Ex. 803.

Where the attesting witness is dead, or insane, or infamous, or absent in a foreign country, or not amenable to the process of the Superior Courts, or where he cannot be found after diligent inquiry, evidence of the witness' handwriting has always been admissible.

The sufficiency of the inquiry is for the determination of the Judge, who will found his opinion upon the nature and circumstances of each case. When the Court is satisfied that due diligence has been used to find the witness, then it is sufficient to prove his handwriting, without proving the handwriting of the party, unless with the view to establish the identity.

Nelson v. *Whittall*, 1 B. & A. 19.

It is not sufficient ground for admitting evidence of the witness' handwriting that he is unable to attend from illness and lies without hope of recovery. The party interested in his testimony must in such a case get a Judge's order to examine him out of Court.

Harrison v. *Blades*, 3 Camp. 457.

Where the name of a fictitious person is inserted as witness, or where the subscribing witness denies any

knowledge of the execution or gives evidence that the document was not duly executed, or where the attesting witness subscribes his name without the knowledge or consent of the parties,—in these cases it becomes necessary to prove the instrument by calling some one acquainted with the handwriting of the person executing it, or who was present at the time of execution, or by admission of the party.

Where there are two attesting witnesses, and one of them is incompetent, or his evidence cannot be obtained, the other witness must be called, and evidence of the handwriting of the absent witness will not be sufficient.

Cunliffe v. *Sefton*, 2 East 183.

In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that seeing his own signature to it he has no doubt that he saw it executed. Sufficient.

Maugham v. *Hubbard*, 8 B. & C. 16.

Where notice was given to produce a deed in the defendant's possession, and the defendant at the trial refused to do so, plaintiff was allowed to prove it by a copy without calling any attesting witness, and it was held that the defendant could not put the plaintiff to

a strict proof by afterwards producing the attested original.

Jackson v. *Allen*, 3 Stark. 74.

Some evidence of the *identity of the party* to the instrument must be given, though any slight evidence will be sufficient.

To prove a *corporation deed*, the seal must be proved by some one who knows it, but it is not necessary to call a witness who saw it affixed.

A lease may be proved *prima facie* by producing the counterpart executed by the defendant, without notice to produce the original lease.

Where there is a discrepancy between the two instruments the lease prevails.

Where an indenture is in two parts, each party executing each part, if there is a material variation between the two parts the indenture is void for want of mutuality.

Wynne's Case, L. R. 8 Ch. 1002.

The above are the general rules as to proving a deed, and are, I trust, a useful digression.

To return to actions on deeds and bonds generally, the defence of denial by the defendant of the making of the deed has been already stated.

Under special defences the defendant may show that

the deed was executed as an escrow, and was to take effect as a deed only upon some event which has not happened; or that the deed, after being sealed, was tendered to the covenantee, and he expressly rejected it; or, in the case of a corporation deed, irregularity or want of due authority in the execution of the deed.

Other special defences are:

Alteration of deed. (See page 80.)
Fraud. (See page 81.)
Statute of Limitations.

The Statutes of Limitation applying to deeds or specialties are R. S. O. 1887, c. 60 and c. 111. The effect of these statutes is that no more than six years' arrears of rent or interest in respect of any sum charged on or payable out of any land or rent shall be recovered by way of distress action or suit other than and except an action of covenant or debt on a specialty, in which case the limit is twenty years.

In an action on the covenant in a mortgage deed to pay the mortgage debt the limit is ten years.

R. S. O. 1887, c. 111, s. 23.

It must be shown which of the three sorts of acknowledgments, viz., writing, payment, or satisfaction in part, is relied on.

Forsyth v. *Bristowe*, 8 Ex. 347.

2. Some of the Most Material Issues Arising in Actions on Leases or Other Conveyances of Real Property.

This will be considered—

(*a*) Where plaintiff sues as assignee of reversion, with the defences of:

Assignment over of reversion by plaintiff.
Assignment over of term by defendant.
Surrender.
Eviction.

(*b*) Where defendant is sued as assignee of the lease.

(*c*) Action for rent under indenture of demise, with the defences of:

Payment.
Plea of readiness to pay on the land.
Statute of Limitations.

(*a*) WHERE PLAINTIFF SUES AS ASSIGNEE OF REVERSION.

The assignee of a reversion cannot recover rent accrued due before the assignment.

See *Wittrock* v. *Hallinan*, 13 U. C. R. 135.

The assignee of the reversion cannot sue for breaches of covenant which accrued before the assignment to him.

Martyn v. *Williams*, 1 H. & N. 817.

Although R. S. O. 1887, c. 109, s. 10, enacts that a right of entry for condition broken shall pass by will, yet this does not extend to an action upon a covenant broken in a testator's lifetime.

Where plaintiff at time of lease has no title, but afterwards acquires one, the lease and reversion take effect in interest, and an action will lie by the assignee of the reversion on the covenants in the lease.

Sturgeon v. *Wingfield*, 15 M. & W. 224.
Galbraith v. *Irving*, 8 O. R. 751.

The plaintiff must prove title by showing mesne conveyances from original lessor.

Carvick v. *Blagrave*, 1 B. & B. 531.

DEFENCE.

Assignment over of Reversion by Plaintiff.

The lessor cannot bring an action of covenant on the lease, after he has parted with his reversion, for any breach of covenant running with the land which has accrued subsequently to the grant of the reversion; but the action can be brought only by the assignee of the reversion. The defendant may therefore set up 32 H. VIII. c. 34. This statute only applies to leases by deed.

Assignment over of Term by Defendant.

In an action against the assignee of a term on a covenant in the lease, he may plead that he assigned over the term before breach, for the assignee is only liable for those breaches which have occurred while he is assignee; but for those breaches he may be sued even after he has parted with the term.

The defendant must prove that the whole term has been legally transferred by him to another, *i.e.*, when necessary by deed.

See R. S. O. 1887, c. 100, s. 8.

Surrender.

A surrender of a lease must be by deed, not being of an interest which might by law have been created without writing.

R. S. O. 1887, c. 100, s. 8.

There may also be a surrender by act or operation of law. Anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of the premises amounts to a surrender by operation of law.

Phene v. *Popplewell*, 12 C. B., N. S. 340.

Eviction.

An action of covenant for non-payment of rent can

be defeated by proof of an eviction of the defendant from the premises in question, either by the lessor or by one whose title is better than his.

Not so if defendant has not given up possession of the whole.

Newton v. *Allin*, 1 Q. B. 518.

(*b*) WHERE DEFENDANT IS SUED AS ASSIGNEE OF THE LEASE.

It will be necessary to prove either a transfer of the interest by deed, or facts from which an assignment may by law be inferred. It will be sufficient *prima facie* evidence to show that the defendant has paid rent as assignee, or is in possession of the premises.

DEFENCE.

The defendant may prove that he is not an assignee of the whole term, but only an undertenant.

The defendant is not chargeable as assignee of the land for the entire rent if the assignment be of part only.

Curtis v. *Spitty*, 1 N. C. 756.

As to what covenants run with land so as to bind the assignees, see *Spencer's Case*, 1 Sm. L. Cas. and Notes.

Berrie v. *Woods*, 7 C. L. T. 8.
Ambrose v. *Fraser*, *Ib.* 364.
Emmett v. *Quinn*, 7 A. R. 306.

(c) ACTION FOR RENT UNDER INDENTURE OF DEMISE.

An action lies by lessor, or grantee of reversion, against lessee on his express covenant to pay rent, *non obstante* he have assigned the lease, and the lessor or his grantee have accepted the assignee as his tenant. But the lessor cannot, after he has parted with his reversion, bring an action of covenant for rent accrued due after grant of reversion under 32 H. VIII. c. 34.

The lessor may bring an action of debt against assignee of lessee by reason of privity of estate; but an action of covenant will not lie against original lessee after acceptance of assignee by lessee as his tenant.

Montgomery v. *Spence*, 23 U. C. R. 39.

The demise may be proved by production and proof of a lease executed by the plaintiff and accepted by the defendant, or by proof of the execution of it by the defendant.

DEFENCE.

Payment. (See page 90.)

Readiness to pay on land good in case of debt for rent; not good in action on covenant.

Statute of Limitations. (See page 85.)

An instance where it was doubtful whether the assignment should be treated as of the reversion or

of future rent accruing out of the land, and so void as not under seal; or as an assignment of a chose in action, viz., of the moneys payable under the covenants of the lease, and so valid.

Galbraith v. *Irving*, 8 O. R. 751.

Any act of the tenant without the knowledge or sanction of the landlord can only affect his interest as tenant, and cannot prejudice the reversioner.

Dixon v. *Cross*, 4 O. R. 465.

A plea to an action of covenant for rent against the assignee of a lease, that all the estate of the lessee did not come to and vest in the defendant, is a good plea.

Annis v. *Corbet*, 1 U. C. R. 303.

A, as lessor, leases to B, and covenants to repair, and then assigns to C, *the rent for the term which B is to have.* B sues C on A's covenant. *Held*, C not liable, as he had no reversion, and the covenant would not run with the rent.

McDougall v. *Ridout*, 9 U. C. R. 239.

Covenant by lessee to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings. *Held*, a covenant running

with the land, and that an action would lie on it against the assignee of the lessee.

Douglass v. *Murphy*, 16 U. C. R. 113.

In covenant for rent, a plea relying on the plaintiff's acceptance of the assignees as his tenants, and on his receipt of prior rent (not the rent sued for) from them, as relieving defendant, the lessee, from any further liability, is a bad plea, as being no defence to an action on an express covenant.

Stinson v. *Magill*, 8 U. C. R. 271.

ACTIONS ON COVENANTS RELATING TO LAND.

We now consider actions for the breach of the various covenants as enumerated on page 101.

Action for Breach of Covenant not to Assign.

To prove the breach of a covenant not to assign or under-let it has been held to be *prima facie* sufficient to show that a stranger was in the possession of the premises apparently as a tenant, and that on inquiry such stranger said he rented the house.

Doe d., Hindly v. *Rickerby*, 5 Esp. 4.

In another case it was held not sufficient, for *non constat* that the party in possession was not a tortious intruder.

Doe v. *Payne*, 1 Stark. 86.

Morris v. *Williams*, 6 B. & C. 41, seems to show that mere possession would be evidence of an assignment.

See *Crawford* v. *Bugg*, 12 O. R. 8.

The measure of damages in an action for a breach of covenant not to assign, etc., is such a sum of money as will put the plaintiff in the same position as if the covenant had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability.

Williams v. *Earle*, L. R. 3 Q. B. 739.

Actions for Breach of Covenant as to Trade on Premises, and for Breach of Good Husbandry, etc.

The proof of any act which, according to the natural and ordinary meaning of their words, is forbidden by these covenants will entitle the plaintiff to a verdict.

Action for Breach of Covenant to Insure.

Where the affirmative is peculiarly within the knowledge of the party charged, the presumption of the law in favour of innocence is not allowed to operate; but the general rule applies that he who asserts the affirmative has to prove it, and not he who avers the negative. Thus, in an action on a covenant for not insuring

premises against fire, it lies on the defendant to prove he has insured.

Toleman v. *Portbury*, L. R. 5 Q. B. 288.

Action for Breach of Covenant to Repair.

The proper measure of damages is the diminution of the value of the reversion at the time of action. See, further,

Minshull v. *Oakes*, 2 H. & N. 793.
Smith v. *Peat*, 9 Ex. 161.

Action for Breach of Covenant to Pay Rates and Taxes.

An absolute covenant to pay rates is broken on non-payment, although no demand has been made on the tenant for payment.

Davis v. *Burrell*, 10 C. B. 821.

Held, that under the wording of the covenant to pay "all taxes, rates, duties and assessments whatsoever . . . now charged, or hereafter to be charged, upon the said demised premises," the defendant was liable for local improvement taxes, and for the additions made under the Assessment Act, year by year, to the amount of the taxes in arrear, or additions made by the municipality.

Boulton v. *Blake*, 12 O. R. 532.

Action for Breach of Covenant for Title.

The covenants for title on which actions are brought are principally: A covenant that the grantor is seized in fee, or has power to convey; for quiet enjoyment, and for freedom from incumbrances.

By R. S. O. 1887, c. 100, s. 17, certain covenants are implied.

Action for Breach of Covenant to Yield up Possession of Premises at the End of the Term.

The landlord is entitled to recover all the loss he has sustained by not being put in possession of the entire premises at the end of the term; he is entitled to a sum equivalent to the rent he has lost, and to the costs of an ejectment where necessary.

Henderson v. *Squire*, L. R. 4 Q. B. 170.

Where a lessee took a lease of premises for two years and covenanted to leave the premises without notice at the end of that time,

Held, that on ejectment, brought by the lessor at the end of the term, the lessee could not set up a former lease to him for a longer period.

Doe d., Wimburn v. *Kent*, 5 O. S. (U. C.) 437.

ACTION FOR DOUBLE VALUE.

Under 4 Geo. II. c. 28, against tenant wilfully holding over after—

1. Determination of term.
2. Demand made.
3. Notice in writing.

Notice to quit includes a demand.

Plaintiff must prove the demise, the determination of the term, the demand, and the value.

In estimating value only the land and its real easements and appurtenances can be included.

DEFENCE.

The defendant may show that the plaintiff has waived the notice to quit on demand of possession; and where the plaintiff has accepted rent due from the defendant after the expiration of notice to quit, it is a question for the jury whether such rent was received in part satisfaction of the double value or as a waiver of it.

Ryall v. *Rich*, 10 East 52.

ACTION FOR DOUBLE RENT.

By 11 Geo. II. c. 19, s. 18, if any tenant shall give notice to quit, and does not quit, he shall pay double rent.

The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and actually gives a valid notice sufficient to determine it.

Johnstone v. *Huddlestone*, 4 B. & C. 922.

ACTION ON BOND.

See 8 and 9 W. III. c. 11, s. 8.

The plaintiff must set out the breaches he relies upon, in two ways:

1. By *assignment*, which is traversable.
2. By *suggestion*, which is not traversable.

In latter case defendant cannot show excuse of performance. But plaintiff must show that bond produced is same on which judgment obtained.

The jury are to find nominal damages and costs as well as damages on the breaches; but plaintiff cannot recover more than the penalty and costs.

Greer v. *Johnston*, 40 U. C. R. 116.

DEFENCE.

Payment.

Payment before the day fixed for it was always evidence of a plea of payment at the day; but before Statute 4 and 5 Anne, c. 3, s. 12, payment after the

day fixed, or at a different place from that fixed, was not pleadable in bar. By that Act payment of principal and interest due on a mere money bond made before action is a bar, though not made exactly according to the condition.

The defendant must prove the defence, though such defence is in fact a denial of the breach of the condition.

Penny v. *Foy*, 8 B. & C. 8.

ACTION FOR PENALTY.

In an action of debt on a penal statute the general evidence for the plaintiff is proof of the commission of the act upon which the penalty has accrued, and, if a time be limited by the statute for bringing the action, proof that the action was brought within the time.

The Crown alone can sue for the penalty where the statute does not say who shall recover it, unless an interest therein is given to some person by the statute expressly or by sufficient implication as if it is created for a party grieved.

Clarke v. *Bradlaugh*, 8 Ap. Ca. 354 D. P.

The writ is in all cases the commencement of the action, and the statement of claim will show the day

on which it is issued. When the writ has been renewed proof of the renewal is requisite.

DEFENCE.

By 21 Jac. I. c. 4, s. 4, not guilty by statute may be pleaded. (See page 79.)

Held, that 18 Eliz. c. 5 is in force in Ontario, and, therefore, the plaintiff, an infant, suing by his next friend, could not maintain an action for a penalty under the Election Act.

Garrett v. *Roberts*, 10 A. R. 650.

No damages are recoverable in a penal action except the penalty.

Frederick v. *Lookup*, 4 Burr. 2018.

PART IV.

ACTIONS ON WRONGS INDEPENDENT OF CONTRACT.

The actions under this heading are as follows:

	PAGE
Nuisance	122
Negligence	126
Disturbance of support of land	138
Obstruction of light or air	139
Disturbance of way	139
Disturbance of watercourse	142
Infringement of copyright	144
Infringement of trade marks	145
Infringement of patents	147
Deceit and misrepresentation	149
Defamation	150
Malicious prosecution	162
Malicious arrest	164
Wrongful distress	165
Seduction	171
Assault and battery	173
False imprisonment	174
Trespass to personal property	179
Trespass to land	180
Mesne profits	181
Conversion of goods	182
Detention of goods	193
Recovery of land	193
Replevin	200

ACTION FOR NUISANCE.

Where the nuisance is a public one, so as to be an indictable offence, an indictment or information is the proper remedy, and an action will not lie at the suit of a private person, unless he has sustained special damage by such nuisance beyond that sustained by other persons.

Winterbottom v. *Lord Derby*, L. R. 2 Ex. 316.

The plaintiff must prove his possessory title, the nuisance and the damage.

If the plaintiff is in possession, whether as owner or otherwise, it is sufficient to prove that he was *possessed* of the premises injured by the nuisance. If the nuisance be of a permanent nature, or injurious to the reversion, an action may be brought by the reversioner, as well as by the tenant in possession.

Bedingfield v. *Onslow*, 3 Lev. 209.

The action lies by the reversioner even against his own tenant, and even although the injury is caused by an act done in breach of an express covenant by the defendant.

To erect anything offensive near the house of another, as to make it useless, is actionable.

In case of a public nuisance, where special damage

is alleged, the private injury or damage as a ground of action appears.

Whether an act done is a nuisance or not depends not only on the act itself, but on the surrounding circumstances, for what would be a nuisance in one place would not be a nuisance in another.

Sturges v. *Bridgman*, 11 Chy. Div. 852.

There is a difference between a nuisance which produces material injury to the property and one which produces merely sensible personal discomfort.

Tipping v. *St. Helen's Smelting Co.*, 11 H. L. C. 642.

If, after a highway has been established, anything be newly made so near to it as to be dangerous to those using the highway, this will be unlawful and a nuisance; but a road may be dedicated to the public subject to the inconvenience or risk arising from its peculiar condition.

Fisher v. *Prowse*, 31 L. J., Q. B. 212.

Where the obstruction is lawful it may give rise to an action upon proof that it was concealed and the plaintiff invited to pass near it.

Corby v. *Hill*, 4 C. B., N. S. 556.

The action may be brought either against the per-

son who originally occasioned the nuisance or against his alienee who permits it to be continued; but a request to the alienee to remove or abate the nuisance must be proved.

Penruddock's Case, 5 Rep. 101.

If a contractor employed to do a lawful act causes a nuisance in the course of his work, the contractor alone, and not the employer, is responsible. In such cases the action lies only against the person who by himself or his servant committed the injury; and a subcontractor or other person exercising an independent employment is not a servant within the meaning of the rule so as to render his employer liable.

Allen v. *Hayward*, 7 Q. B. 960, 975.

Where the employer retains his control over the contractor, and personally interferes and makes himself a party to the act that has occasioned the damage, he becomes liable.

Burgess v. *Gray*, 1 C. B. 578.

Where the nuisance directly results from the thing contracted to be done the employer is liable.

Ellis v. *Sheffield Gas Co.*, 2 E. & B. 767.

Although the owner of land, after letting it, is not

liable for a nuisance erected by the tenant, yet if he lets or re-lets the land with a nuisance upon it, or retains control of the repairs, he is liable.

Trustees or commissioners acting for public purposes without salary or reward are not exempt from the responsibility which is incurred by private individuals.

Coe v. *Wise*, L. R. 1 Q. B. 711.

As to municipalities, see liabilities imposed by the Municipal Act.

R. S. O. 1887, c. 184.

The injury must be the natural or ordinary consequence of the defendant's wrongful act.

Sharp v. *Powell*, L. R. 7 C. P. 253.

Where the nuisance is a continuing one, so that successive actions may be brought, the measure of damages is the amount of injury sustained up to the time of assessment of damages, and the jury may, upon a further action, give substantial damages.

Battishill v. *Reid*, 18 C. B. 696.

The defendant's intention in doing the act is to be taken into consideration in assessing the damages.

Emblen v. *Myers*, 6 H. & N. 54.

DEFENCE.

It is a good defence to show that what was *prima facie* a nuisance arose unavoidably from the performance by the defendants of acts expressly sanctioned by the Legislature; but the defendants will be liable if their acts cause needless injury, or if they do not take reasonable steps within their power for averting such injury.

Where the gist of the action is the consequential damage, the time of limitation begins to run from the accruing of the consequential damage.

Hathaway v. *Doig*, 6 Ap. R. 264.
Gardiner v. *Chapman*, 6 O. R. 272.

As to damages, see *Drew* v. *Baby*, 1 U. C. R. 438.

As to contaminating air, see *Cartwright* v. *Gray*, 12 Ch. 399.

As to action by tenant, see *Arnold* v. *White*, 5 Ch. 371.

ACTION FOR NEGLIGENCE.

The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do; and an action may be brought if

thereby mischief is caused to another person not intentionally.

Blyth v. *Birmingham*, 11 Ex. 781.

The following are some of the most common causes of action included under this head:

NEGLIGENT DRIVING OF CARRIAGES AND RAILWAY TRAINS.

See page 70, under "Action Against Carriers."

A master is not answerable for the wilful and malicious act of his servant.

M'Manus v. *Crickett*, 1 East 106.

Where the injury is the result of mere accident, no action lies. To maintain an action, the act must have been wilful or the result of negligence.

Holmes v. *Mather*, L. R. 10 Ex. 261.

In order to subject the master to damages it must appear that there has been something to blame on the part of his servant, and he is blamable if he has not exercised the best and soundest judgment on the subject.

Jackson v. *Tollett*, 2 Stark. 39.

In the case of an accident on the railway it is not

enough for the plaintiff to show that there has been an accident upon their line, and thence to argue that therefore the company are liable even *prima facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; the plaintiff should also show with reasonable certainty what particular precaution should have been taken.

Daniel v. *Metropolitan Ry. Co.*, L. R. 3 C. P. 216, 222.

The defendant may show that the immediate and proximate cause of the injury was the unskilfulness or negligence of the plaintiff; but although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong.

Bridge v. *Grand Junction Railway*, 3 M. & W. 244.

In estimating the damages recoverable for a personal injury caused by negligence, the jury must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a

reasonable view of the case, and give what they consider under all the circumstances a fair compensation.

Rowley v. *London & N. W. Ry. Co.*, L. R. 8 Ex. 221.

NEGLIGENT NAVIGATION OF SHIPS.

The liabilities under this heading are governed by the Merchant Shipping Act—17 and 18 Vict. c. 104; 25 and 26 Vict. c. 63; 30 and 31 Vict. c. 124; and 36 and 37 Vict. c. 85. See collection of Imperial Statutes affecting Ontario published by the Ontario Government in 1876.

NEGLIGENT KEEPING OF ANIMALS.

The owner of an animal which is ordinarily vicious, as a lion or a bear, is liable generally for its acts of ferocity, for he is bound to keep it secure at his peril; but the owner of a domestic animal, as an ox or a dog, is only liable if he knows that the animal is accustomed to do mischief.

Under R. S. O. 1887, c. 214, s. 9, any person may kill any dog which he sees pursuing, worrying or wounding any sheep or lamb.

By section 15 the owner of any sheep or lamb killed or injured by any dog is entitled to recover the damage occasioned thereby from the owner or keeper of such dog by action or by summary proceeding, and the

knowledge of the owner or keeper of the dog as to its viciousness need not be proved.

The gist of the action is not the negligent keeping, but the keeping with the knowledge of the mischievous propensity, *i.e.*, the *scienter*.

See *Chase* v. *McDonald*, 25 U. C. C. P. 129.
Mason v. *Morgan*, 24 U. C. R. 328.

NEGLIGENT USE OF LAND.

See "Nuisance" and "Disturbance of Support of Land."

NEGLIGENT KEEPING OF FIRE OR INFLAMMABLE MATTER.

By 14 Geo. III. c. 78, s. 86, no action will lie against any person in whose house, etc., or on whose estate, any fire shall accidentally begin.

The effect of the statute is to rebut the presumption that the happening of the fire was the result of negligence.

A railway company is not responsible for accidental fires if they have taken every precaution that science can suggest to prevent injury; they are only liable if guilty of some negligence in fact, and negligence cannot be implied from the mere employment of locomo-

tives where the use of them has been expressly permitted by the legislature.

Vaughan v. *Taff Vale Ry. Co.*, 5 H. & N. 679.
See *McGibbon* v. *Northern*, 14 A. R. 91.
McLaren v. *Canada Central*, 8 A. R. 564.

The defendant is not entitled to deduct from the damage sustained money received by the same plaintiff under a fire policy.

By R. S. O. 1887, c. 213, *An Act to Preserve the Forests from Destruction by Fire*, fire districts may be proclaimed. After such proclamation precautions must be observed, which are fully set out in the Act. Actions for contravention of the Act must be brought within three months after the contravention.

NEGLIGENCE OF RAILWAY COMPANIES.

Although the mere happening of an accident is not in general *prima facie* evidence of negligence, and the plaintiff is bound to give some evidence in support of the defendant's negligence, yet the accident may be of such a nature that negligence must be assumed from the unexplained fact of the accident happening.

Byrne v. *Boadle*, 33 L. J. Ex. 13.

By R. S. C. c. 109, s. 90, every railway company which runs trains upon the railway for the conveyance

of passengers shall use the best appliances for communication between conductors and engine drivers, and for brakes, and for disconnecting cars, and for securing seats in the cars. By the same Act, section 13, the company must erect and maintain fences and cattle guards. While maintained the company shall not be liable for damages done to cattle, etc., unless the same are caused wilfully or negligently by the company or by its employees.

By the same Act, section 48, the inclination of a highway at railway crossings must not be greater than one foot of rise or fall for every twenty feet, and a fence at least four feet high must be made on each side of such approach. Other regulations are provided as to crossings of other railways, the rate of speed in cities, trains moving reversely and cars standing on crossings, for the infraction of which provisions penalties are provided.

By section 54 of the same Act farm crossings are provided for.

By section 96 trains, before passing any draw or swing bridge, must stop.

By section 104,

(1) All trains shall be started and run at regular hours fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previously thereto offered for transportation at

the place of starting, and at the junctions of other railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains;

(2) Such passengers and goods shall be taken, transported to and from, and discharged at such places on the due payment of the toll, freight or fare lawfully payable therefor;

(3) Every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants.

The clauses next above set out are found in the Railway Act of Ontario, R. S. O. 1887, c. 170, s. 41, (2), (3) and (4).

Similar clauses to the other sections referred to are also found in the same Act.

By R. S. C. c. 110, provisions are made respecting the sale of railway passenger tickets, providing for the appointment of agents for the sale of tickets and for the issue of stop-over tickets on demand. Complaints under this Act must be prosecuted under the provision of the *Summary Convictions Act*, R. S. C., c. 178. The examination of any complainant may be used in evidence on the hearing of any appeal.

By R. S. O. 1887, c. 212, *The Railway Accidents Act*, special provisions are made for the safety of railway employees and the public.

By R. S. O. 1887, c. 199, provisions are made for the crossing of railways by streets, drains and water mains.

By R. S. O., 1887, c. 141, s. 4, where within this Province personal injury is caused to a workman employed on or about any railway, by reason of certain defects specified in such section, the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right to compensation and remedies against the company as if the workman had not been a workman of nor in the service of the company, nor engaged in its work.

By sub-section 1 of section 5 the remedy is taken away, and there is no right of compensation unless the defect arose from, or had not been discovered or remedied owing to the negligence of the company, or of some person in the service of the company, and entrusted by them with the duty of seeing that the ways, works, machinery or plant were in proper condition.

By section 5, sub-section 3, in any case where the workman knew of the defect or negligence which caused his injury, and failed within reasonable time to give notice to the company or some person superior to himself in the company's service, unless he was aware that the company or such superior already knew of the said defect or negligence, in such case the workman loses his remedy.

As to damages occasioned by fire from locomotives,

besides the general principles already mentioned, special provisions are made by R. S. O. 1887, c. 213, s. 9, *An Act to Preserve the Forests from Destruction by Fire,* enforcing special regulations as to locomotives.

NEGLIGENCE OF FELLOW-SERVANTS.

A master, although liable for the negligence of a servant acting in the course of his employment, is not at common law generally responsible for an injury sustained by that servant owing to the negligence of another servant engaged with him in a common employment.

To make a master liable to his servant or workman, there must be personal negligence or interference of the master, or a special contract.

Ormond v. *Holland,* E. B. & E. 102.

The master is, however, bound to exercise due care and caution in the choice of his servants; otherwise he may become liable in respect of his own negligence in this respect,

Tarrant v. *Webb,* 18 C. B. 787;

and he is bound to take all reasonable precautions to secure the safety of his workmen.

Brydon v. *Stewart,* 2 Macq. 30.

The above rules must now be read subject to R. S. O. 1887, c. 141, referred to on page 134. Its title is, *The Workman's Compensation for Injuries Act.* It provides for compensation against an employer where personal injury is caused to a workman by reason of

1. Defect in machinery.
2. Negligence of superintendent.
3. Negligence of any co-employee under whose orders the injured workman was.
4. Disobedience to by-laws of some other employee.
5. Negligence of pointsman, driver or train hand on a railway.

Notice in writing must be given within twelve weeks after the injury, and the action must be commenced within six months.

Assessors may be appointed for the purpose of ascertaining the amount of the compensation.

WRONGFUL ACT, DEFAULT OR NEGLECT, CAUSING DEATH.

By R. S. O. 1887, c. 135, *An Act Respecting Compensation to the Families of Persons Killed by Accidents and in Duels,* an action is given to recover damages for the death of any person caused by any wrongful act, neglect or default,

Such action shall be commenced within twelve months after the death of the deceased.

The negligence is the cause of action, and the death of the person injured does not, under this statute, give rise to a fresh cause of action to the personal representative.

Read v. *G. E. R. Co.*, L. R. 3 Q. B. 555.

The jury, in estimating the damages, cannot take into consideration the mental suffering of the survivors or loss of society which they have sustained, but are to award compensation for pecuniary loss alone.

Blake v. *Midland Ry. Co.*, 18 Q. B. 93.
See *McGibbon* v. *N. R. Co.*, 14 A. R. 91.
Steinhoff v. *Kent*, 14 A. R. 12.
Preston v. *Camden*, 14 A. R. 85.
Moxley v. *Can. Atl.* 14 A. R. 309.
Dean v. *Ont. Cotton Mills Co.*, 14 O. R. 119.
Cox v. *Hamilton Sewer Pipe Co.*, 14 O. R. 300.
Matthews v. *Hamilton Powder Co.*, 7 C. L. T. 304
Delong v. *Burrell*, 7 C. L. T. 23.
Rudd v. *Bell*, 7 C. L. T. 61.
Downs v. *Lee*, 7 C. L. T. 214.
Beasley v. *Hamilton*, 9 O. R. 112.

ACTION FOR DISTURBANCE OF SUPPORT OF LAND.

No one has a right to deprive the soil of his neighbour while in its original condition of lateral support; but the plaintiff may acquire a right to the support of the defendant's soil by grant, express or implied.

Partridge v. *Scott*, 3 M. & W. 220.

Tenant may maintain action.

McCann v. *Chisholm*, 2 O. R. 506.
See *Wray* v. *Morrison*, 9 O. R. 180.

The plaintiff may recover prospective damage as well as that which has already accrued from the interference with his right of support, for he can maintain one action only for the whole damage he may sustain.

Lamb v. *Walker*, 3 Q. B. D. 389.
See *Snarr* v. *Granite*, 1 O. R. 102.

See *Battishill* v. *Reid*, 18 C. B. 696, as to a continuing nuisance. How far a disturbance of a support of land may be considered as a nuisance so as to come within the rule of *Lamb* v. *Walker*, *supra*, does not appear to be decided.

ACTION FOR OBSTRUCTION OF LIGHT OR AIR.

By R. S. O. 1887, c. 111, s. 36, no person shall acquire a right by prescription to the access and use of light to or for any dwelling-house, workshop or other building; but this section shall not apply to any such right acquired by twenty years' use before the 5th of March, 1880. This section altered the law as it stood under R. S. O. 1877, c. 108, s. 36, by which twenty years' access and use of light gave an indefeasible right.

See *Carter* v. *Grasett*, 11 O. R. 331.

ACTION FOR DISTURBANCE OF WAY.

The plaintiff must prove:

1. Possession of certain premises.

2. The existence of a right of way appurtenant thereto.

3. The disturbance of it by the defendant.

The modes of proving a right of way are:

1. By express grant.

2. By usuer.

3. By necessity.

The proof of a right of way by express grant is a question more of construction than evidence.

The right of way by necessity arises by implied grant. If A grants a tenement surrounded by his own land to B, B is entitled to right of way to it through the land of the grantor if such way be absolutely necessary to the right of enjoyment to what is granted.

As to the mode of ascertaining the way, see

Pearson v. *Spencer*, 1 B. & S. 571.

Formerly a right of way not claimed by express grant must have been shown to have existed from time immemorial, *i.e.*, from the beginning of the reign of Richard I., A.D. 1189. This is called a claim by prescription at Common Law to distinguish it from a claim by prescription of statute.

By R. S. O. 1887, c. 111, s. 35, rights of way or water are not to be defeated by showing only that they began more than twenty years before. When enjoyed over forty years the right is indefeasible.

The plaintiff must prove some disturbance by the defendant.

By *Short Form Act*, R. S. O. 1887, c. 105, every deed, unless an exception be made therein, shall be held to include all ways, easements and appurtenances whatever to the lands therein comprised.

See *Maughan* v. *Casci*, 5 O. R. 518.

DEFENCE.

The defendant may, under the defence of the denial of the right, prove that the way was only a way by sufferance during the pleasure of himself and the plaintiff.

Reignolds v. *Edwards*, Willes 282.

As evidence of which he may show that he has kept a gate across the road or that the plaintiff has paid him a compensation for the use of the way.

If the way is claimed as a way of necessity, the defendant may show that the plaintiff can approach the place to which it leads over his own land, and that consequently the way of necessity has ceased.

Holmes v. *Goring*, 2 Bing. 76.

The defendant may also show that the right of way has been removed and abandoned by acquiescing in an obstruction for more than twenty years.

Bower v. *Hill*, 1 N. C. 555.

Or where it is claimed under the Act the defendant may show an acquiescence in an interruption for one year of the twenty or forty relied on by the plaintiff.

Glover v. *Coleman*, L. R. 10 C. P. 108.

The defendant may also prove an extinguishment

of the right by a substantial alteration in the original object of the grant of the way.

Unity of possession extinguishes an easement.

Clayton v. *Corby*, 2 Q. B. 813.

The action cannot be brought by a reversioner unless the disturbance be of a permanent character, so as to threaten an injury to the freehold.

ACTION FOR DISTURBANCE OF WATER-COURSE.

The plaintiff must prove:

1. The possession of a mill, backwater or other tenement in respect of which the right of water is enjoyed.
2. The right to the water.
3. The disturbance.
4. The damage.

A riparian proprietor has a right to a reasonable use of the water for his domestic purposes and for his cattle, without regard in the case of a deficiency to the interests of proprietors lower down the stream.

Miner v. *Gilmour*, 12 Moo. P. C. 156.

The right to use it to the prejudice of any proprietor of land above or below, by throwing back, diverting

or polluting it, is a right for which the claimant must show a title by contract, prescription or other adequate authority.

Mason v. *Hill*, 5 B. & Ad. 1.

The owner of the banks and bed of a river (not being a navigable one) may sever them and deal with them as with any other real estate.

Elliott v. *Baird*, 26 Chy. 549.
See *Attrill* v. *Platt*, 10 S. C. R. 425.

Sections 3 to 6, inclusive, of the *Act respecting Mills and Mill Dams* (R. S. O. 1887, c. 118) relate to appliances for passing timber.

By section 15, when an action is brought against a mill-owner for overflow caused by his mill-dam, and it appears that the injury was caused by a dam which was built before the purchase of the land by the grantee of the Crown, and before the grant thereof to him, and that the purchaser obtained a reduction of the price of the land, or was otherwise indemnified in consequence of its being so overflowed, then at the trial these facts may be taken into consideration.

By R. S. O. 1887, c. 119, *An Act Respecting Water Privileges*, persons desiring to enter and acquire lands for improving water privileges may do so in the mode provided by the Act. An application is made to the County Judge.

By R. S. O. 1887, c. 120, *An Act for Protecting the Public Interest in Rivers, Streams and Creeks,* provisions are made allowing the construction of improvements for the purpose of floating down timber and for levying tolls.

By R. S. O. 1887, c. 121, *The Saw-logs Driving Act,* provision is made for the proper management of driving logs down rivers and streams.

ACTION FOR INFRINGEMENT OF COPYRIGHT.

R. S. C. c. 62, *The Copyright Act,* contains full provisions as to who may obtain copyright and how copyright may be obtained.

International copyright is governed by 7 and 8 Vict. c. 12.

As to copyright in the colonies, see 10 and 11 Vict. c. 95. See Ontario collection of Imperial Acts before referred to. See also

Smiles v. *Belford,* 1 A. R. 436.

A plaintiff must prove, in an action for infringement of copyright, that he was entitled to copyright at the time copyright was granted, and that the requisites of

the Act as to deposits of copy, etc., had been complied with.

By section 26 all copies and extracts certified from the Department of Agriculture shall be received in evidence without further proof and without production of the originals.

As to copyright in Lectures, see

Abernethy v. *Hutchinson*, 3 L. J. O. S. Ch. 209.
Nichols v. *Pitman*, 50 L. T. 254.

To create a perfect right under the Copyright Act there should be an assignment in writing of such parts of the book as the owner of the copyright is willing to permit his licensee to publish. The owner may disentitle himself by his conduct to an injunction.

Allen v. *Lyon*, 5 O. R. 615.
See *The Canada Publishing Co.* v. *Gage*, 11 S.C.R. 306

ACTION FOR INFRINGEMENT OF TRADE MARKS.

The principle on which the court protects trade marks is that it will not permit a party to sell his goods as the goods of another.

McCall v. *Theal*, 28 Chy. 48.

Trade marks are provided for by R. S. C. c. 63.

The questions to be determined are:

1. Whether the defendant's mark is a colorable imitation of the plaintiff's mark.

2. Whether the defendants have been selling goods so marked, so as to lead purchasers to believe that they are the plaintiff's goods.

Mitchell v. *Henry*, 15 Chy. D. 181. C. A.

To found an action at law there must have been an intention to deceive and make the goods pass as those of the tradesmen who had appropriated the marks, and the questions for the jury are: Is the resemblance such as to deceive ordinary persons? Was the mark adopted by the defendant with that intent, and in order to supplant the plaintiff's goods? If the jury find in the affirmative, no special damage need have been proved. It is not necessary that the defendant should be aware that the mark had been appropriated by the plaintiff.

Fox v. *Millington*, 3 Myl. & Cr. 338.

It is not necessary to show that defendant's goods are inferior to the plaintiff's.

Blofield v. *Payne*, 4 B. & Ad. 410.

ACTION FOR INFRINGEMENT OF PATENTS.

The issue of patents is regulated by R. S. C. c. 61.

The patent is proved by producing the patent itself.

By section 50 the seal of the Patent Office is to be evidence, and all copies or extracts certified under the seal of the Patent Office shall be received in evidence without further proof and without production of the originals.

The plaintiff must prove that the article was not made by him or his agents. The question of fraudulent intention to infringe is not material; the acts alone are material. The plaintiff must, in the first instance, give some slight evidence of the nature and novelty of the invention. Prior use may avoid a patent, though not generally if the use was not secret.

The plaintiff must elect whether he will proceed for damages or for an account which the Court may award. He cannot have both.

Betts v. *DeVitre*, L. R. 6 H. L. 319.
Beam v. *Merner*, 7 C. L. T. 234.
Ball v. *Crompton*, 7 C. L. T. 181.

DEFENCE.

1. Denial of grant.
2. Denial of infringement.

A slight deviation from the process described in the specification, for the purpose of evading the patent, is a fraud. The question is whether the defendant's mode is substantially different.

If a well-known equivalent, chemical or mechanical, is substituted by the defendant for part of the patent invention, it is a mere colorable variation, and therefore an infringement.

A patent for a combination of several things, old and new, is infringed by an imitation of that part which is new.

3. That the plaintiff is not the first inventor, or that the invention is not new.

4. Public user before patent granted.

If the invention was publicly put in use by the inventor before the grant, it will avoid it, though mere knowledge and publication of it after invention but before grant will not.

5. That the specification does not truly describe the invention and how it is to be performed.

Section 13 of R. S. C. c. 63 sets out the requisites for the specification.

Section 28 of the same Act voids a patent if any material allegation in the petition or declaration of the applicant required by the Act in respect of such patent is untrue, or if the specifications and drawings contain more or less than is necessary for obtaining

the end for which they purport to be made, when such omission or addition is wilfully made for the purpose of misleading. If the omission or addition were involuntary, a patent may be allowed to be good to a partial extent.

Sections 30, 31, 32 and 33 deal specially with actions for infringement of patent, and provide that such actions may be brought in any Court of Record having jurisdiction to the amount of the damages claimed in the Province in which the infringement is alleged to have taken place, and which is also that one of the said Courts which holds its sittings nearest to the place of residence or business of the defendant. Power is given to issue injunctions, and where it appears that the defendant used or infringed any part of the invention justly and truly specified and claimed as new, the Court may discriminate.

The defendant is allowed to plead specially, as matter of defence, any fact or default which, by the Act itself or by law, renders the patent void.

ACTION FOR DECEIT AND MISREPRESENTATION.

An action will lie in respect of a fraudulent representation made by the defendant to the plaintiff, in-

tended to be acted on by him, and on which he has acted and thereby suffered damage.

Pasley v. *Freeman* 3 T. R. 51.

With respect to the liability of A for the fraud of another person, A is liable for the fraudulent representations made by his agent B in the course of carrying on A's business for his benefit.

A person is responsible for a false representation made by him to another on which a third person acts, provided that the representation were made with the direct intent that it should be acted on by such third person in the manner that occasions the injury, and that the injury be the immediate consequence of the representation.

Garland v. *Thompson,* 9 O. R. 376.

The plaintiff must prove actual damage to himself in order to maintain the action.

Hyde v. *Bulmer,* 18 L. T. N. C. 293.

ACTION FOR DEFAMATION.

Scott v. *Crerar,* 14 A. R. 152.
Wells v. *Lindop,* 14 O. R. 275.
Porter v. *McMahon,* 7 C. L. T. 250.

Regina v. *Woodworth*, 7 C. L. T. 246.
Cowan v. *Landell*, 7 C. L. T. 71.
Gorst v. *Barr*, 7 C. L. T. 225.
Central Bank v. *Osborne*, 12 P. R. 160.
McLay v. *Bruce*, 14 O. R. 398.

There is a well-known distinction between written and spoken slander. False defamatory words, if spoken, constitute a slander; if written and published, a libel. Words which produce any perceptible injury to the reputation of another are called "defamatory." If false, they are actionable.

In any given case the fact that the words employed by the defendant have perceptibly injured the plaintiff's reputation may be either

1. Presumed from the nature of the words themselves, or

2. Proved by evidence of their consequences.

It will be presumed from the nature of the words themselves,

(*a*) If the words, being written and published, or printed and published, are in any way disparaging to the plaintiff, or tend to bring him into ridicule and contempt.

(*b*) If the words, being spoken,

1. Charge the plaintiff with the commission of some indictable offence.

2. Impute to the plaintiff a contagious disorder tending to exclude him from society.

3. Are spoken of the plaintiff in the way of his profession or trade, or disparage him in an office of public trust.

In all these cases the words are said to be actionable *per se*, because on the face of them they clearly must have injured the plaintiff's reputation.

But in all cases of spoken words the fact that the plaintiff's reputation has been injured thereby must be proved at the trial by evidence of the consequences that directly resulted from their utterance. Such evidence is called "evidence of special damage," as distinguished from that general damage which the law assumes, without express proof to follow from the employment of words actionable *per se*.

The intention or motive with which the words were spoken is, as a rule, immaterial.

Sometimes it is a man's duty to speak fully and freely, and without thought or fear of the consequences; and then the above rule does not apply. The words are privileged by reason of the occasion on which they were employed, and no action lies therefor unless it can be proved that the defendant was actuated by some special spite, or some wicked or malicious motive. In all other cases malice in fact need not be

proved at the trial. The words are actionable if false and defamatory, although spoken or published accidentally or inadvertently, or with an honest belief in their truth.

The person defamed has a civil remedy to recover damages, and in some cases he can also proceed criminally by way of information or indictment.

There is no method of anticipating or preventing a libel or a slander. There is no censorship of the press. Any man is free to speak or to write and publish whatever he pleases of another, subject only to this: that he must take the consequences should a jury deem his words defamatory. This is what is meant by the "liberty of the press."

No injunction can be obtained to prohibit the publication or republication of any libel, or to restrain its sale. The Crown has no authority to restrain the press; and the Courts, whether of law or equity, cannot till after verdict issue any injunction in respect of any libels, save such as are contempts of Court.

Saxby v. *Easterbrook*, 3 C. P. D. 339.

The question in each case is, Has the reputation of this individual been appreciably impaired in consequence of the words employed by the defendant? No general rule can be laid down beforehand what

words are defamatory and what are not. The injury to the reputation is the gist of the action. In libel the words need not necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous.

Everyone has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. It is often said that such criticism is *privileged*. This does not mean that the words are "privileged by reason of the occasion" in the strict legal sense of the term. The defence really is that the words are not defamatory—that criticism is no libel.

What are matters of public interest? The public conduct of every public man. All political, legal and ecclesiastical matters, therefore, are matters of public concern.

With regard to *construction* the question is, How would ordinary men, previously unacquainted with the matter, fairly understand the words?

This is clearly a question for the jury, and therefore it is expressly provided (32 Geo. III. c. 60, Fox's Libel Act) that in all criminal actions for libel the jury are to decide the question of libel or no libel, subject to the direction of the Judge. In civil proceedings for libel the practice is the same, save that here, if the

Judge thinks that the words cannot possibly bear a defamatory meaning, he may enter a non-suit. If the Judge considers that the words are reasonably susceptible of a defamatory meaning, as well as an innocent one, then it will be a question for the jury. The Judge should not lay down as a matter of law that the publication complained of is or is not a libel. The proper course is for the Judge to define what is a libel in point of law and leave it to the jury to say whether the publication in question falls within that definition.

So, too, in slander the Judge usually decides whether the words are or are not actionable *per se*, and whether the special damage assigned is or is not too remote. If the defendant's words cannot reasonably bear the meaning attached to them by the inuendo, and the Judge thinks the words without that meaning are not actionable, he will stop the case; but where there is any reasonable doubt as to the true construction of the words, the Judge leaves the question to the jury.

The *inuendo* is the statement by the plaintiff of the construction he puts upon the words himself, and which he endeavours to induce the jury to adopt at the trial.

If, in their ordinary English meaning, the words used would be intelligible, facts must be given in evidence to show that they may have been used in a particular sense on this particular occasion. After that

has been done a bystander may be asked, "What did you understand by the expression used?"—not before. If the words are local, or slang, or cant terms, etc., evidence is admissible to explain their meaning (provided such meaning has been properly alleged in the statement of claim).

Daines v. *Hartley*, 3 Exch. 200.

Where the meaning of the defendant's words is clear or has been ascertained, the next question is, Was the imputation sufficiently definite to injure the plaintiff's reputation? Is it clear that it was the plaintiff to whom he referred? Unless these questions can be answered in the affirmative no action lies.

Publication is the communication of the defamatory words to some third person. It is essential to the plaintiff's case that the defendant's words should be *expressed.* It is no publication when the words are only communicated to the person defamed; for that cannot injure his reputation. There must be a communication by the defendant to some third person other than the plaintiff. The plaintiff must prove a publication by the defendant *in fact.* That the third person had the opportunity of reading the libel is not sufficient, if the jury are satisfied that he did not in fact avail himself thereof.

Though composing a libel without publishing it is

not actionable, merely publishing it without composing it is actionable.

So again, every sale or delivery of a written or printed copy of a libel is a fresh publication, and every person who sells or gives away a written or printed copy of a libel may be made liable, unless he can satisfy the jury that he was ignorant of the contents.

There is a great difference between libel and slander. The actual publisher of a libel may be an innocent messenger; whereas in every case of a republication of a slander the publisher acts consciously and voluntarily—the repetition is his own act. Therefore if A slanders B, A is only liable for the damages which result directly from his own act.

The truth of any defamatory words is, if pleaded, a complete defence in any action of libel or slander (although alone it is not a defence in a criminal trial), The onus of proving that the words are true lies on the defendant. A justification must always be specially pleaded.

In criminal matters the defendant must also prove that it was for the public benefit that the matters charged should be published. Before 1843 (6 and 7 Vict. c. 96) the truth of the libel was no defence to the indictment. The maxim prevailed, "The greater the truth the greater the libel." In Rome the truth of the

libel was undoubtedly a defence both to criminal and civil proceedings. (See Horace Satires, Bk. II. 1, 83, 5.)

It is a defence to an action for libel or slander to prove that the circumstances under which the defamatory words were written or spoken afforded an excuse for their employment. And this is so even though the words be proved or admitted to be false. The occasion is said to be *privileged*. The utterance is excused for the sake of common convenience and for the welfare of society. There are two kinds of privileged occasions—

1. *Absolutely privileged*, such as words spoken in Parliament.

2. Qualified.

The course of procedure at the trial is as follows:

The plaintiff is always entitled to begin, even where the onus of proof lies on the defendant. The plaintiff must prove, where necessary, his special character. He must next prove that the defendant published the libel or spoke the slanderous words to some third person.

The libel itself must be produced at the trial. The jury are entitled in all cases to see it. The defendant is entitled to have the whole of it read.

Whether a communication is or is not privileged is a question for the Judge alone. If there is any doubt as to the circumstances the jury finds what they were,

and then, on their findings, the Judge decides whether the occasion was privileged or not. If the occasion was not privileged, and the words are defamatory and false, the Judge will direct a verdict for the plaintiff. If the occasion was absolutely privileged, judgment will be given for the defendant. If, however, the Judge decides that the occasion was one of qualified privilege only, the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he gives no such evidence, it is the duty of the Judge to nonsuit him or to direct a verdict for the defendant. If he does give any evidence of malice sufficient to go to the jury, then it is a question for the jury whether or not the defendant was actuated by malicious motives. Malice is defined as any indirect and wicked motive which induces the defendant to defame the plaintiff. If malice be proved, the privilege attaching to the occasion is lost at once.

In cases of slander the only way to prove publication is by calling those who heard the defendant speak the words.

Whenever the words used are not well known and perfectly intelligible English, but are foreign, local, technical, provincial or obsolete expressions, parol evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the statement of claim by an innendo.

If the libel does not name the plaintiff, there may be need of some evidence to show who was meant. The plaintiff may give evidence of all surrounding circumstances, *i.e.*, the cause, the occasion of publication, later statements made by the defendant, and other extraneous facts which will explain and point the allusion. The plaintiff may also call at the trial his friends or others acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff. It is not enough for the plaintiff to prove his special character, and that the words refer to himself; he must further prove that the words refer to himself in that special character, if they be not otherwise actionable.

The Judge must decide whether the occasion is or is not privileged, and also whether such privilege is absolute or qualified.

Malice may be proved either by extrinsic evidence of personal ill-feeling or by intrinsic evidence, such as the exaggerated language of the libel, the mode and extent of publication, and other matters in excess of the privilege.

If the defendant has pleaded a justification, the plaintiff's counsel may, if he chooses, rebut the justification, or he may leave such proof till the reply; but he cannot call some evidence to rebut the justification and more afterwards, thus dividing his proof.

The plaintiff need give no evidence of any actual damage where the words are actionable *per se*. He can nevertheless recover substantial damages. But if the plaintiff has suffered any special damage, this should be pleaded and proved. It cannot be proved unless it has been pleaded. Where the words are not actionable *per se*, the plaintiff cannot prove a general loss of custom; he must call individual customers and friends, and ask them why they have ceased to deal at his shop or to entertain him.

DEFENCE.

The defendant's counsel often prefers not to call any witnesses, so as to have the last word with the jury. He may rely instead upon the cross-examination of the plaintiff's witnesses. These may be cross-examined not only as to the facts of the case, but also as to the credit, *i.e.*, as to matters not material to the issue, with a view of shaking their whole testimony; but the defendant must take the witness' answer—he cannot call any evidence to contradict it, except on the point of a previous conviction.

The defendant must be careful not to increase by such cross-examination the amount of damages that may be given against him.

The defendant may show that the plaintiff's trade is illegal.

The defendant may show, in mitigation of damages, that he published the libel innocently, without any knowledge of its contents.

He may also give evidence of antecedent conversations and transactions, or other circumstances well known to the bystanders, which show that the words were not used in their ordinary signification. The defendant may urge that the occasion of publication was privileged.

The defendant may also prove the justification. Strict proof must be given that the whole charge made is true in every particular.

Where no justification is pleaded the defendant can give no evidence of the truth of his words, not even in mitigation of damages.

The Ontario Act relating to libel and slander is R. S. O. 1887, c. 57.

The Dominion Act respecting libel is R. S. C. c. 163.

ACTION FOR MALICIOUS PROSECUTION.

The plaintiff must prove:

1. The prosecution of the plaintiff.
2. Its determination.

3. That the defendant was the prosecutor.
4. His malice and want of probable cause.
5. The damages sustained.

The fact of the prosecution, where instituted in the Superior Courts or Sessions, is usually proved by the production of the record or an examined copy. By R. S. O. 1887, c. 61, s. 23, a certified copy of a record is evidence of the record.

The proper evidence to establish the fact that the defendant was prosecutor is: that the defendant employed a solicitor or agent to conduct the prosecution; that he gave instructions concerning it, paid the expenses, procured the attendance of witnesses, or was otherwise active in forwarding the prosecution.

It is essential that the plaintiff should give some evidence of the defendant's malice. If the plaintiff proves want of probable cause, malice may be inferred; but for this purpose the want of probable cause must be proved to the satisfaction of the jury. Want of probable cause is not conclusive evidence of malice.

Winfield v. *Kean*, 1 O. R. 193.

The onus of proving the want of reasonable and probable cause, and of proving the existence of such facts as are evidence of such want, lies on the plaintiff.

"Reasonable and probable cause is for the Judge."

The jury may give damages for the loss of reputation, the imprisonment (if any has taken place), and the expenses incurred by the plaintiff in making his defence.

DEFENCE.

The defendant may not give evidence of the plaintiff's bad character.

ACTION FOR MALICIOUS ARREST AND ABUSE OF CIVIL PROCESS.

In an action for malicious arrest the plaintiff must prove:

1. The affidavit for the Judge's order to arrest.
2. Its falsehood.
3. The order for the arrest.
4. The arrest under it.
5. The rescission of the order or the determination of the suit.
6. The defendant's malice and want of reasonable and probable cause.
7. The damage.

Colbert v. *Hicks*, 5 A. R. 571.

As to actions against magistrates and other officers, see under "Actions for False Imprisonment," *post.*

The present Ontario Act respecting arrest and imprisonment for debt is R. S. O. 1887, c. 67.

ACTION FOR WRONGFUL DISTRESS.

EXCESSIVE DISTRESS.

Founded on 52 Henry III. c. 4, which enacts that "distress shall be reasonable and not too great, and he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses."

The plaintiff must prove:

1. The tenancy of the defendant at a certain rent.
2. The rent claimed to be due.
3. The taking a distress of goods of much greater value than the rent in arrear and charges of the distress.
4. The damages.

The simple fact of making a distress accompanied by an untrue claim of more rent than is due, and selling the goods under such claim, is not actionable unless some special damage be proved, or unless it be shown that a larger quantity of goods has been sold than was sufficient to satisfy the rent actually in arrear.

Tancred v. *Leyland*, 16 Q. B. 669.

In action for excessive distress, the plaintiff may recover though no special damage be proved.

Black v. *Coleman*, 29 U. C. C. P. 507.

The tenancy must be proved by production and proof of the lease, or by the defendant's receipts for rent or notices to quit, or other admission by him of the tenancy, or by oral evidence of the contract when there is none in writing.

These preliminary statements are, however, usually admitted by the bailiff's notice of distress or other proceedings.

The plaintiff must prove that his goods were distrained, but it is not necessary to prove that they were sold or taken away; the seizure as a distress is sufficient.

The fact of the distress may be proved by calling the bailiff or other person who made the distress, who will also prove his authority from the defendant. If this evidence cannot be procured, the plaintiff should serve the defendant with notice to produce the warrant of distress and give secondary evidence of it, or should connect the act of the bailiff with the defendant by some other evidence.

When a landlord is about to make a distress he is not bound to calculate very nicely the value of the

property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take it.

In order to establish the excess the plaintiff must be prepared with proof of the value of the goods seized. The question of excess is for the jury.

Smith v. *Ashforth*, 29 L. J., Ex. 259.

DEFENCE.

Not guilty, by statute 11 George II. c. 19, secs. 19, 21. The defendant may give evidence that the distress was not excessive, or that the chattel distrained was entire, and that there was no other distress; but this statute does not apply to an illegal distress.

Field v. *Mitchell*, 6 Esp. 71.

Where a party distrained as landlord on goods which, as a matter of fact, had by subsequent agreement between himself and the tenant before the distress became his absolutely.

Held, that he might justify the taking on this latter ground.

Bell v. *Irish*, 45 U. C. R. 170.
Shultz v. *Reddick*, 43 U. C. R. 155.

IRREGULAR DISTRESS.

At common law goods distrained for rent were

merely a pledge, and could not be sold. 2 William and Mary, c. 5, gave the landlord the power of selling the goods, subject to the provisions of that Act, which must be strictly complied with.

If there was any irregularity in making or treating the distress, the landlord was at common law liable as a trespasser *ab initio*. This rule was altered, in the case of a distress for rent due, by 11 George II. c. 19, s. 19, which enacts that a party aggrieved by an irregularity can recover satisfaction for the special damage sustained thereby.

In an action for selling goods distrained for rent without appraisement the measure of damages is the real value of the goods sold minus the rent due.

Knight v. *Egerton*, 7 Ex. 407.
Schultz v. *Reddick*, 43 U. C. R. 155.

DEFENCE.

By 11 George II. c. 19, s. 20, it is provided that the tenant shall not recover for any unlawful act or irregularity if tender of amends has been made by the party distraining before action brought.

ILLEGAL DISTRESS.

Where a distress is made by a stranger, or by a person who has no right to distrain, an action for trespass or conversion will lie.

Where a distress is made by a landlord (1) no rent being due,* or (2) after a tender of the rent, or (3) after a formal distress, or (4) if the distress be illegal owing to the time, place or manner of making it, or from the nature of the goods taken, the proceeding is illegal *ab initio*, and an action for trespass or conversion, or of replevin, may be maintained.

An action for distraining for more rent than is due cannot be maintained without a tender of the sum which is really due.

Owen v. *Taylor*, 39 U. C. R. 358.

In the case of an illegal distress the measure of damages is usually the value of the goods seized, and no deduction can be allowed for any rent due.

Attack v. *Bramwell*, 3 B. & S. 520.

DEFENCE.

The defence of not guilty by statute above referred to (11 George II. c. 19) lets in evidence of everything that might lawfully be done in order to make the distress.

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* Where a landlord distrains and sells where no rent is due, by 2 W & M. Sess. 1 c. 5 s. 4, the plaintiff shall recover double the value of the goods distrained.

See *McCallum* v. *Snyder*, 6 U. C. L. J. 187.
Hope v. *White*, 17 U. C. C. P. 52.

R. S. O. 1887, c. 143, *An Act Respecting the Law of Landlord and Tenant*, contains most important provisions as to exemptions from distress.

Section 27 enacts that goods exempt from seizure under execution are not liable to seizure by distress.

By section 28 goods on the premises not the property of the tenant are to be exempt under certain restrictions.

Section 29 gives the tenant a right of set-off against the rent due, a debt due to him by the landlord.

By section 30 a tenant who is in default for non-payment of rent, and claims the benefit of the exemption under the Act, must give up possession of the premises.

By section 31, the common law, strict demand of rent is dispensed with when the landlord is entitled to re-enter. Unless the premises are vacant, the demand must be made fifteen days at least before entry.

By section 32, when growing or standing crops, which may be seized and sold under execution, are seized for rent, the landlord need not reap, thresh, gather, or otherwise market such crop, but may advertise and sell them like other goods.

Sections 27, 28, 29, 30 and 34 apply only to tenancies created on or after the 1st of October, 1887.

The protection of goods of lodgers from distress is provided for by section 44.

The boarder or lodger may serve on the landlord, or on the person making the distress, a declaration that the immediate tenant has no property in the goods distrained, and that such goods are the property of the lodger, also setting out what amount is due for rent or board from the lodger to the immediate tenant. If the landlord, after receiving the declaration and the rent due by the lodger, proceeds with the distress against the lodger's goods, he is liable to an action for illegal distress.

ACTION FOR SEDUCTION.

These actions are not cognizable by County Courts (R. S. O. 1887, c. 47, s. 18) or by Division Courts (R. S. O. c. 51, s. 69).

By R. S. O. 1887, c. 58, the following provisions are made:

Section 1.—The father, or, in case of his death, the mother, whether she remains a widow or remarries, of any unmarried female who has been seduced, and for whose seduction the father or mother could maintain an action in case such unmarried female were at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was at the time of her seduction

serving or residing with another person upon hire or otherwise.

By section 2, upon the trial of an action for seduction brought by the father or mother, it shall not be necessary to prove service performed by the person seduced, but the same shall in all cases be presumed, and no proof shall be received to the contrary.

In case the father or mother of the female seduced had, before the seduction, abandoned her and refused to provide for and maintain her as an inmate, then any other person who might at common law have maintained an action for the seduction may maintain such action.

By section 3 any person other than the father or mother who could at common law have maintained an action for an unmarried female may still maintain such action if the father or mother be not resident in Ontario at the time of the birth of the child which may be born in consequence of the seduction, or, being resident in Ontario, does not bring an action for the seduction within six months from the birth of the child.

Subject to the above Act the plaintiff must prove:

1. That the party seduced was in the plaintiff's service.

2. The seduction.

The plaintiff must prove the defendant to have been the father of the child; mere proof of seduction by him will not be sufficient.

Kimball v. *Smith*, 5 U. C. R. 32.

3. The subsequent loss of service.

The plaintiff cannot give evidence of the daughter's good character, except in answer to evidence of general bad character given on the other side.

Bamfield v. *Massey*, 1 Campbell 460.

DEFENCE.

The defendant may show that he is not the father of the child.

In mitigation of damages the defendant may show the loose character of the girl.

Evidence as to defendant's means is inadmissible.

Ferguson v. *Veitch* 45 U. C. R. 160.

ACTION FOR ASSAULT AND BATTERY.

An assault or battery must be an act done against the will of the party assaulted.

The circumstances of time and place, when and where the assault was given, require different damages.

DEFENCE.

There is no assault if the plaintiff consented to the defendant's act, nor if the injury is the result entirely of a superior agency and is unavoidable, and the conduct of the defendant entirely without fault.

The following are the main defences in this action:

1. That the plaintiff made the first assault, and the defendant's battery was in self-defence.

2. That the assault was committed in defence of possession.

3. Reasonable chastisement.

4. Process of law.

5. Conviction or certificate of dismissal under the *Summary Convictions Act*, R. S. C. c. 178, s. 75.

ACTION FOR FALSE IMPRISONMENT.

The plaintiff must prove:

1. The fact of imprisonment.

2. That it was caused by the defendant.

3. The special damage, if any.

In actions against Magistrates, Judges, etc., the rule is, that if they do any act beyond the limit of their authority they thereby subject themselves to an action of trespass; but if the act done be within the limit of

their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action.

Doswell v. *Impey*, 1 B. & C. 169.

Even where they exceed their jurisdiction they are are not liable unless they know or have the means of knowing the defect of jurisdiction.

Actions against Justices of the Peace cannot be brought in the County Court if the objection is taken (R. S. O. 1887, c. 47, s. 18), nor in a Division Court (R. S. O. 1887, c. 51, s. 69). See also R. S. O. 1887, c. 73, s. 15.

R. S. O. 1887, c. 73, *An Act to Protect Justices of the Peace and others from Vexatious Actions*, provides as follows:

Section 1.—In an action for things done within the jurisdiction of a Justice of the Peace or a Police Magistrate, malice and want of probable cause must be alleged and proved.

By section 20, if at the trial of the action the plaintiff does not prove:

1. That the action was brought within six months next after the act complained of was committed;

2. That notice of action in writing was given one month before the action was commenced;

3. The cause of action stated in the notice;

4. That the cause of action arose in the county or district the county town of which is named in the statement of claim as the place of trial;

5. Where the plaintiff sues in a County, District or Division Court, that the cause of action arose within the county, district or united counties for which such Court is holden;

Then and in such case the plaintiff shall be non-suited or a verdict given for the defendant.

By section 21, if the plaintiff is proved to have been actually guilty of the offence of which he was convicted, or that he was liable by law to pay the sum he was ordered to pay, or that he has undergone no greater punishment than the legal punishment, he is entitled only to three cents damages and no costs of action, even if he proves his cause of action in other respects.

By section 23, costs are allowed as between solicitor and client to a successful plaintiff or defendant in this action.

By R. S. O. 1887, c. 16, s. 30, every bailiff or constable, and by section 29 every coroner or elisor, guilty of misconduct in execution process are liable to the party aggrieved in damages.

If a private person falsely and maliciously, and

without any probable cause, puts the law in motion to cause the apprehension of another, it is properly the subject of an action for malicious prosecution.

DEFENCE.

The defendant may prove in justification that a felony has actually been committed (but not a misdemeanor, except in cases of breach of the peace committed in the defendant's presence, with a danger of a renewal of the breach), and that there is reasonable and probable cause to suspect that the plaintiff committed a felony.

A constable having reasonable cause to suspect that a felony has been committed is justified in arresting the party suspected, though it afterwards appear that no felony has been committed. It is otherwise in the case of misdemeanor without a warrant, except in the case of a breach of the peace committed in his presence, or in the presence of someone else who gives the person committing into custody, there being a danger of renewal; but if there is no such danger, and the arrest is not the result of a continued pursuit, the arrest is unlawful. He is in no case justified in handcuffing a prisoner, unless it be necessary to prevent an escape, or an escape be attempted.

Wright v. *Court*, 4 B. & C. 596.

By 24 Geo. II. c. 44, s. 8, no action shall be brought against any constable for anything done under a warrant unless commenced within six calendar months after the act committed.

In an action for a false imprisonment the six months are to be reckoned exclusive of the day of the discharge of the prisoner.

Hardy v. *Ryle*, 9 B. & C. 603.

By 21 Jac. I. c. 21, s. 3, an action for false imprisonment must be brought within four years after such cause of action.

By the last-mentioned statute, 21 Jac. I. c. 12, any action brought against any "mayor or bailiff of city or town corporate, head borough, portreeve constable, tithing man, churchwarden or overseer of the poor," for any matter done by virtue of their office, such action must be brought in the county where the offence was committed. The defendant may plead the general issue and give his special matter in evidence.

Evidence may be given in mitigation of damages where such evidence tends to show reasonable grounds of suspicion.

ACTION FOR TRESPASS TO PERSONAL PROPERTY.

This action includes every direct forcible injury or act disturbing the possession of goods without the consent of the owner, however slight or temporary the act may be.

Any possession is sufficient as against the third person who has no title at all. Property is sufficient without possession, for the right of property draws to it the possession.

Balme v. *Hutton*, 9 Bing. 471.

Where a mortgagor of chattels is not to enter till default, he cannot bring trespass against the third party before such entry.

Wheeler v. *Montefiore*, 2 Q. B. 133.

In an action for taking goods under a legal process wrongfully issued, the plaintiff is entitled to at least nominal damages, or to such substantial damages as the jury think adequate, although special damage is alleged but not proved.

Doss v. *Doss*, 14 L. T., N. S. 646.

ACTION FOR TRESPASS TO LAND.

In order to maintain this action the plaintiff ought to have possession, actual or constructive.

Topham v. *Dent,* 6 Bing. 516.

An interest in the soil, without an exclusive use of it, is sufficient to support trespass. On the other hand, exclusive possession, without property or interest in the soil, is also sufficient for this action.

It must appear that the plaintiff was in the actual and immediate possession of the *locus in quo* when the trespass was committed. There are some cases in which, by the doctrine of relation, the plaintiff is allowed to recover for trespass committed at a period when he was not in fact in possession; thus the entry of an heir relates back to the time of the right of entry, so as to support an action against a wrongdoer for a trespass committed after the accrual of the right and before actual entry.

Barnett v. *Earl of Guildford,* 11 Ex. 19.

As to damages, the jury may consider not only the pecuniary damage sustained, but also the intention with which the act has been done, whether for insult or injury.

Sears v. *Lyons,* 2 Stark. 318.

DEFENCE.

Not guilty by statute.

Denial of property or possession in plaintiff. Defendant may set up title in himself or a third person, by whose command he entered. In this defence the issue is upon the defendant.

Disclaimer and tender of amends.

This is allowed by 21 Jac. I. c. 16, s. 5. Where the defendant sets up a justification, it is enough to prove a justification which covers the trespass, although it does not cover mere matters of aggravation.

The defendant may set up also a right of way or a license. The license may be either an express one or one implied from circumstances.

ACTION FOR MESNE PROFITS.

A plaintiff can now include a claim for mesne profits with an action for recovery of land. Hence the action for mesne profits seldom arises alone. It may occur, however, and is therefore set out.

The plaintiff must prove:

1. His title.
2. His re-entry.

3. The defendant's liability by reason of possession.

4. The amount of damage.

This action is an instance of the application of the doctrine of relation.

As to damages, the jury are not confined to the mere rent or annual value of the premises, but may give such extra damages as they think fit as a compensation for plaintiff's trouble, etc.

Other special damage may be recovered if laid as deterioration of the premises by waste or mismanagement by the defendant.

As to claims for mesne profits in an action for dower.

See *Ryan* v. *Fish*, 4 O. R. 335.

ACTION FOR CONVERSION OF GOODS.

This action is equivalent to the old action of trover. To maintain the action there must be an act of conversion such as must amount to a deprivation of the possession to such an extent as to be inconsistent with the right of the owner and evidence an intention to deprive him of that right.

The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case

the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases the real question is whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage; and, if so, to what extent has he sustained damage.

Stimson v. *Block*, 11 O. R. 96.

The above remarks do not preclude the application of the following rules:

As to the evidence, the plaintiff must prove:

1. A general or special property in the goods, or, as against a wrongdoer, mere possession of them.

2. An actual or constructive possession or right of possession.

3. A wrongful conversion by the defendant.

4. The value or damages.

The damages are the value of the thing converted.

The evidence for the plaintiff will depend upon the nature of his particular title. Where there is both a general and a special owner, but the general owner has not transferred his right to the possession, he may still maintain this action. Thus, where he has delivered the goods to a carrier or other bailee, and so parted with the actual possession, he may still maintain trover for a conversion by a stranger; for the

owner retains the possession in law as against a wrong-doer, and the carrier or other bailee is only his servant.

Gordon v. *Harper*, 7 T. R. 42.

With regard to the time at which the property passes at a sale of goods, where goods are sold and nothing is said as to the time of delivery or of payment, and everything the seller has to do with them is complete, the property rests in the buyer, so as to subject him to the risk of any accident which may happen to the goods.

Tarling v. *Baxter*, 6 B. & C. 360.

The seller is liable to deliver them whenever demanded upon payment of the price, but the buyer has no right to have possession of the goods till he pays the price. If the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute: it is liable to be defeated if he becomes insolvent before he obtains possession.

Bloxam v. *Sanders*, 4 B. & C. 948.

In the case of the sale of unascertained goods, until both parties have assented to the appropriation of

some particular goods to satisfy the contract, the property in them does not pass.

Dixon v. *Yates*, 5 B. & Ad. 313.

But where an appropriation has been made by one party, in pursuance of an authority to make the election conferred by agreement, it becomes final and irrevocably binding on both parties.

Aldridge v. *Johnson*, 7 E. & B. 885.

In general, when goods are ordered to be made, so long as the order is not executed, but only in course of execution, no property passes to the person for whom they are to be made.

Mucklow v. *Mangles*, 1 Taunt. 318.

In order to pass the property there must in such cases be a completion and an acceptance, or at least an approval by the buyer.

Atkinson v. *Bell*, 8 B. & C. 277.

By a gift of goods the property does not pass unless the gift be by deed or instrument of gift, or be executed by an actual delivery of the thing given to the donee.

Irons v. *Smallpiece*, 2 B. & A. 551.

A grant of goods not in existence, or not belonging

to the grantor at the time of executing the deed of grant, was void at law until the grantor ratified the grant by some act done by him with that view after he had acquired the property therein.

Lunn v. *Thornton*, 1 C. B. 379.

In equity, however, a contract which engaged to transfer to a purchaser or mortgagee property of which the vendor or mortgagor was not possessed at the time, transferred the beneficial interest immediately on the property being acquired by him.

Holroyd v. *Marshall*, 10 H. L. C. 191.

On this point equity now rules under the Judicature Act.

By a fraudulent or illegal sale or transfer of goods no property passes.

Wilkinson v. *King*, 2 Camp. 335.

But when a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and the possession, although the vendee has committed a false and fraudulent representation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction.

Kingsford v. *Merry*, 11 Ex. 577.

By the common law an agent entrusted with goods cannot convey to a stranger a better right than he himself possesses.

By R. S. O. 1887, c. 128, *An Act Respecting Contracts in Relation to Goods Entrusted to Agents*, sec. 5, any person may contract for the purchase of goods with any agent entrusted with the possession thereof, or to whom the same may be consigned, and may receive and pay for the same to such agent, and such contract and payment shall be binding upon the owner of the goods, notwithstanding the purchaser has notice that he is contracting only with an agent.

Any agent entrusted with the possession of goods, or of the documents of title thereto, is deemed the owner thereof for the following purposes:

1. He can make a sale or contract, as just mentioned.

2. To entitle the consignee of goods consigned by such agent to a lien on the goods for any advance, as if the agent were the owner of the goods.

3. To give validity to any pledge, lien or security *bona fide* made with such agent on the security of the goods, or for a continuing advance.

4. To make a contract binding upon the owner of the goods, although the person claiming lien knew that he was dealing with an agent.

In all cases contracts must be *bona fide*. The con-

viction of any agent for a contravention of the Larceny Act, R. S. C. c. 164, is not admissible in evidence in any action against him.

An antecedent debt does not authorize a lien under the Act.

If stolen goods are sold the property is divested out of the owner.

By R. S. O. 1887, c. 69, a summary mode of recovery is provided of stolen property after trial.

The property in a bank note, like that in cash, passes by delivery, and the party taking it *bona fide* and for value is entitled at common law to retain it as against the former owner from whom it has been stolen. *Miller* v. *Race*, 1 Burr. 452.

The same rule applies to negotiable instruments.

At common law the goods of an execution debtor are bound by a writ of execution from the time of its teste; but by the Statute of Frauds, 29 Car. II. c. 3, s. 16, the goods are only bound from the time of the delivery of the writ to the Sheriff.

If the plaintiff wishes to claim by virtue of a special property, he must prove it.

Where the action is brought against a mere wrongdoer, it will be sufficient for the plaintiff to show that he was in possession of the property.

Jeffries v. *G. W. Ry. Co.*, 5 E. & B. 802.

The plaintiff must show that he has a right to the immediate possession of the goods in order to recover in this action.

The reversioner or person entitled to the freehold of lands on lease may sue in this action for fixtures after severance from the demised land.

The gist of the action is the wrongful conversion of the plaintiff's goods by the defendant. A conversion may be proved either by evidence of a direct act of conversion, or by showing a demand of the goods by the plaintiff and a refusal by the defendant to deliver them, which is evidence of one.

Burroughes v. *Bayne*, 5 H. & N. 296.

An unlawful taking of goods out of the possession of the owner is itself a conversion, and not mere evidence of it. A conversion is described as where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time.

Hiort v. *Bott*, L. R. 9 Ex. 89.

A person in the lawful possession of goods may be guilty of a conversion of them by dealing with them contrary to the orders of the owner.

In order to constitute an actual conversion it is not necessary that the party should deal with the goods as his own. It is enough if it be a dealing for a third person adversely to the true owner.

A wrongful sale of goods is a conversion, and no demand is necessary.

Edwards v. *Hooper*, 11 M. & W. 363.

A demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the power to deliver them, are evidence of a conversion; but, being only presumptive evidence of a conversion, it may be rebutted by evidence to the contrary.

A refusal must be proved; mere excuses for not delivering the goods will not be sufficient.

Severin v. *Keppell*, 4 Esp. 156.

In order to render a demand and refusal evidence of conversion, it must appear that at the time of the demand made the party had it in his power to deliver up or retain the article demanded.

Smith v. *Young*, 1 Camp. 441.

A servant is liable in an action of trover for conversion, though for his master's benefit.

Stephens v. *Elwall*, 4 M. & S. 259.

Trover cannot in general be maintained by one joint tenant in common or parcener against the others.

Jacobs v. *Seward*, L. R. 5 H. L. 464.

In actions for conversion the general rule as to

damages is: the damages shall be the value of the thing converted.

Finch v. *Blount*, 7 C. & P. 478.

DEFENCE.

A lien on the goods, either general or particular, and a right to the possession of them until the claim is satisfied, is a defence.

A general lien may be proved either by evidence of an express agreement, or of the mode of dealing between the parties, or of the general usage of other persons engaged in the same employment of such notoriety as that it may be fairly presumed to have been known to the owner of the goods.

Rushforth v. *Hadfield*, 6 East 526.

In general, where a person bestows his labor upon a particular chattel delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge.

By R. S. O. 1887, c. 126, s. 32, every mechanic or other person who has bestowed money or skill and materials on a chattel may sell the chattel if, after three months, payment is not made.

The vendor of goods not sold upon credit has a lien for the price. This lien is not lost so long as he keeps

possession of the goods as vendor only, even though he has parted with a document transferring a title to the goods.

Imperial Bank v. *Docks Co.*, 5 Chy. D. 195.

In general a lien cannot arise at law unless the party claiming it has possession of the goods.

Kinloch v. *Craig*, 3 T. R. 119.

There may be an equitable lien without possession.

Mackreth v. *Symmons*, 15 Ves. 329.

Stoppage *in transitu* is in the nature of an equitable lien.

In general every unpaid vendor of goods has a right, on the insolvency of the vendee, to stop the goods if still on their way to the vendee. The most usual way in which the right of a vendor to stop goods *in transitu* is defeated is by assigning the bill of lading to a *bona fide* assignee.

Lickbarrow v. *Mason*, 2 T. R. 63.
See R. S. O. 1887, c. 122, s. 5.

By Statute 21 Jac. I. c. 16, s. 3, this action must be brought within six years after the cause of action arose.

ACTION FOR DETENTION OF GOODS.

It is enough to show that the plaintiff is entitled to the possession of goods wrongfully held by the defendant.

It is frequently brought in England to recover the title deeds of real estate.

The damages are in general merely nominal; but the jury find the value of the articles detained, and the common law judgment is that the plaintiff recover the articles or their value, together with the damages and costs found by the verdict, and costs of increase.

DEFENCES.

Leave and license.

Illegality.

Statute of Limitations.

ACTION FOR THE RECOVERY OF LAND.*

The plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's.

* C. R. 416 is as follows:—No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned.

The receipt of rents and profits of land stands on the same footing as actual possession.

The plaintiff must show that he had a right of entry at the time mentioned in the writ.

The plaintiff may, for the purpose of recovering mesne profits from an earlier day, claim the right of possession of the premises from such last-mentioned day.

By the *Lands Titles Act*, R. S. O. 1887, c. 116, s. 82, any certificate of charge is *prima facie* evidence of the matters therein contained.

The plaintiff must formerly have proved a legal title; an equitable title is not sufficient. By the Judicature Act, R. S. O. 1887, c. 44, s. 52, the same relief is given for an equitable title as formerly the Court of Chancery would have given, and the plaintiff need only prove an equitable title.

By R. S. O. 1887, c. 44, s. 53 (4), a mortgagor entitled to the possession of land may sue for the recovery thereof in his own name. In other cases, however, the person in whom the legal estate is vested must be a plaintiff in the action. It is, therefore, still material to consider where it is vested. The general rule is, that in the case of passive trusts created by deed or will the use must either be reduplicated, if limited on a freehold, or must be limited on a term of years;

otherwise a legal estate passes. Where the estate limited to a use is a leasehold or chattel interest, the Statute of Uses is inoperative, and the use limited is a mere trust.

Doe v. *Passingham*, 6 B. & C. 305.

With regard to grants and devises in trust, where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as the payment of the rents and profits to another's separate use, or of the debts of a testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the beneficial devisee or grantee has only an equitable estate.

Jeffreson v. *Morton*, 2 Wms. Saund. 11 B.

The defendant may in some cases disprove the legal title of the party through whom both he and the plaintiff claim; thus, where the plaintiff claims under a conveyance from A B in 1818, and the defendant under a conveyance from A B in 1824, the defendant may show that in 1818 A B had no legal estate to convey.

Oliver v. *Powell*, 1 Ad. & E. 531.

But the defendant may estop himself from setting up such defence; thus an agreement to purchase by a party in possession is such an acknowledgment of

title in the vendor as, in the event of the purchase not being completed, to estop the purchaser from denying the title of the vendor.

Doe d. Bord v. *Burton*, 16 Q. B. 807.

Where the plaintiff is entitled with the defendant as joint tenant, tenant in common or co-parcener, he cannot maintain ejectment unless he has been actually ousted from his possession, or the defendant has done that which is equivalent to ousting.

Culley v. *Taylerson*, 11 Ad. & E. 1008.

In an action by a landlord for the recovery of his land, the plaintiff in general need not prove his own title, but only the demise and its expiration, either by efflux of time, determination of will, demand of possession, notice to quit, disclaimer or forfeiture.

If there is a demise by deed or in writing, it must be proved by the production of the original lease, unless admitted. If in the defendant's possession, notice to produce should be given.

Where the lease is oral it may be proved by a person who was present at the making, or by an admission of the defendant.

A tenant at will cannot be ejected until after demand, which must be made before the date of the writ.

Gallaway v. *Herbert*, 4 T. R. 680.

When a tenancy at will is created, any act inconsistent with a tenancy at will done by either party will amount to a determination of the will, and render unnecessary a formal demand of possession.

Evidence of a demise from year to year may, in the absence of other proof, be gathered from the payment and receipt of yearly rent. This evidence may be rebutted, as by showing that the plaintiff received it on what was really a void lease.

Whether an instrument is a lease or an agreement for a lease depends on the intention of the parties, as may be gathered from the instrument.

Notice to produce a notice to quit* is not necessary.

Doe d. Fleming v. *Sommerton*, 7 Q. B. 58.

Where the lessor proceeds on a forfeiture of the lease, he must prove the demise and the forfeiture.

By R. S. O. 1887, c. 143, *An Act respecting the law of Landlord and Tenant*, a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in a lease shall not be enforceable until after notice, which notice must be proved. This does not apply to non-payment of rent (sub-sec. 7)

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* Nor a notice of dishonour.

Swain v. *Lewis*, 2 C. M. & R. 261.

Under same statute, sections 17 to 26, special provisions are made for the recovery of premises by landlords where a half year's rent is in arrear. Under these sections a landlord must be prepared with evidence of the right of re-entry; a service of the writ or the affixing of a copy of it, etc.; that half a year's rent was in arrear, and that no sufficient distress was found on the premises.

Where the plaintiff claimed as heir at law, he must at common law have proved that the ancestor from whom he claimed was actually seized of the land; or, if he claimed as heir to a remainder man, that his ancestor was the person in whom the remainder first vested by purchase, and also that he was heir to such ancestor. Under the *Devolution of Estates Act*, R. S. O. 1887, c. 108, all fee simple estates descend to the legal personal representatives of the deceased. By section 10, the personal representatives of a person dying after 1st of July 1886, are to be deemed in law his heirs and assigns. Special provisions are made in the same statute as to descents before 1st of July, 1834; since 1st of July, 1834; between the 1st of July, 1834, and 1st of January, 1852; and since the 1st of January, 1852. The proof of heirship will vary according to these dates.

In ejectment by heir at law the most common *de-*

fences are illegitimacy and a will. The defendant, by admitting plaintiff's pedigree and the dying seized, may, where he defends as devisee under a will, entitle himself to begin and reply.

Goodtitle d. Revett v. *Braham*, 4 T. R. 497.

Where the plaintiff claims a freehold interest by a devise, he must prove:

1. The right of the testator to devise the land.
2. The regular execution of the will.
3. The death of the testator.
4. The determination of any prior estates.

The defendant may show a disclaimer by the plaintiff to take under any part of the will, or he may impeach the will by showing the want of due execution, etc. See Wills Act, R. S. O. 1887, c. 109.

A devisee of a leasehold interest must prove:

1. The title of the devisor to the property, unless the defendant be estopped from disputing it.
2. The probate of the will.
3. The assent of the executor to the bequest.

In ejectment by an executor or administrator, the plaintiff must prove:

1. The leasehold title of his testator.
2. The testator's death.
3. The probate or grant of administration.

The death of the termor is proved by oral evidence,

or by proof of the register of death or burial and identity of the party deceased.

The statute relating to limitation of actions relating to real property is R. S. O. 1887, c. 111.

ACTION OF REPLEVIN.

The Replevin Act is R. S. O. 1887, c. 55. Where goods have been wrongfully distrained, the person complaining of such distress as unlawful may bring an action of replevin. Where goods have been otherwise wrongfully taken or retained, the owner, or any person capable of maintaining an action for damages therefor, may bring an action of replevin for the recovery of the goods.

The right to begin at the trial in replevin is the same as in other actions, although both parties are actors.

Curtis v. *Wheeler*, M. & M. 493.

Statute 11 George II., c. 19, makes special provisions with regard to distress for rent. It does not apply to distress for damage feasant.

To an avowry for rent the plaintiff might plead a tender of the rent; to an avowry for damage feasant tender of amends.

APPENDIX.

SECTIONS SELECTED FROM R. S. O. 1887, CAP. 61—EVIDENCE ACT.

COMPETENCY OF WITNESSES.

Witnesses not to be incapacitated by crime or interest.

2. No person offered as a witness shall hereafter be excluded by reason of any alleged incapacity from crime or interest from giving evidence, according to the practice of the Court, on the trial of any action, issue, matter or proceeding, in any Court of Ontario, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence. R. S. O. 1877, c. 62, s. 2.

Such persons admitted to give evidence.

3. Every person so offered shall be admitted to give evidence notwithstanding that such person has an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the action or proceeding in which he is offered as a witness, and notwithstanding that such person has been previously convicted of any crime or offence. R. S. O. 1877, c. 62, s. 3.

Evidence of parties.

4. On the trial of any action, issue, matter or proceeding in any Court in this Province, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence, the parties to the proceedings, and the persons in whose behalf the action or other proceeding is brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, according to the practice of the Court, on behalf of themselves or of either or any of the parties to the action or proceeding; and the husbands and wives of such parties and persons shall, except as hereinafter excepted, be competent and compellable to give evidence, according to the practice of the

Evidence of husband and wife.

Court, on behalf of either or any of the parties to the action or proceeding. R. S. O. 1877, c. 62, s. 4.

Questions tending to criminate need not be answered.

5. Nothing herein contained shall render any person compellable to answer any question tending to criminate himself or to subject him to prosecution for any penalty. R. S. O. 1877, c. 62, s. 5.

Evidence in actions for breach of promise.

6. The parties to an action for breach of promise of marriage shall be competent to give evidence in the action: Provided always that no plaintiff in an action for breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise. 45 V. c. 10, s. 3.

Evidence in proceedings in consequence of adultery.

7. The parties to a proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in the proceeding: Provided that in such case the husband or wife, if competent only under and by virtue of this Act, shall not be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. 45 V. c. 10, s. 4.

Communications made during marriage.

8. No husband shall be compellable to disclose any communication made by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage. R. S. O. 1877, c. 62, s. 8.

Evidence in trials under Acts of Ontario.

9. On the trial of any proceeding, matter or question, under any Act of the Legislature of Ontario, or on the trial of any proceeding, matter or question before any Justice of the Peace, Mayor or Police Magistrate, in any matter cognizable by such Justice, Mayor or Police Magistrate, not being a crime, the party opposing or defending, or the wife or husband of the person opposing or defending, shall be competent and compellable to give evidence therein. R. S. O. 1877, c. 62, s. 9.

In actions by or against representatives of a deceased person, the evidence of the opposite party must be corroborated.

10. In any action or proceeding by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R. S. O. 1877, c. 62, s. 10.

11. In any action or proceeding by or against a person found by inquisition to be of unsound mind, or being an inmate of a lunatic asylum, an opposite or interested party shall not obtain a verdict, judgment or decision therein, on his own evidence, unless such evidence is corroborated by some other material evidence. R. S. O. 1877, c. 62, s. 11.

In actions by or against lunatics, etc., evidence of opposite party to be corroborated.

AFFIRMATIONS.

12. In any case in which an oath, declaration or affirmation is required by law, or upon any lawful occasion whatever on which the oath of any person is by law admissible, a Quaker, Menonist or Tunker, or a member of the church known as the "Unitas Fratrum," or the United Brethren, sometimes called the Moravian Church, having first made the following declaration or affirmation, viz.:

Quakers, Menonists, Tunkers, etc., permitted to make affirmation.

"I, *A. B.*, do solemnly, sincerely and truly declare and affirm that I am one of the Society called Quakers, Menonists, Tunkers or Unitas Fratrum or Moravians" (*as the case may be*);

may make his affirmation or declaration in the form following, that is to say:

"I, *A. B.*, do solemnly, sincerely and truly affirm and declare," etc.;

and such affirmation or declaration shall have the same force and effect to all intents and purposes, in all Courts and all other places, as an oath taken in the usual form. R. S. O. 1877, c. 62, s. 12.

13. If a person called as a witness, or required or desiring to make an affidavit or deposition in a proceeding, or on an occasion whereon or touching a matter respecting which an oath is required, whether on taking office or otherwise, refuses or is unwilling, from alleged conscientious motives, to be sworn, the Court or Judge, or other presiding officer, or person qualified to take affidavits or depositions, may permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, viz.:

Certain persons may make affirmation or declaration instead of oath.

"I, *A. B.*, do solemnly, sincerely and truly affirm and declare that the taking of an oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely and truly affirm and declare," etc.:

which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. R. S. O. 1877, c. 62, s. 13.

Persons who object or are incompetent to take an oath to be allowed to make a declaration.

14.—(1) If, in a Court of justice, a person called to give evidence objects to take an oath, or is objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise, affirmation and declaration:

"I solemnly promise, affirm and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth."

And upon the person making such solemn affirmation and declaration his evidence shall be taken in the said proceeding. 45 V. c. 10, s. 5.

Interpretation.

(2) The words "Court of justice" and the words "presiding Judge" in this section shall be deemed to include any person having by law authority to administer an oath for the taking of evidence. 45 V. c. 10, s. 2.

Persons authorized to administer oaths may administer affirmation.

15. Every person authorized or required to administer an oath for any purpose may administer any affirmation or declaration as aforesaid. R. S. O. 1877, c. 62, s. 14.

EXAMINATION OF WITNESSES.

Proof of contradictory written statements.

17. Upon the trial of any cause a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without the writing being shewn to him; but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the Judge at any time during the trial may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit. R. S. O. 1877, c. 62, s. 24.

Proof of contradictory oral statements.

18. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement. R. S. O. 1877, c. 62, s. 25.

19.—(1) A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court at which the offender was convicted, or by the deputy of the clerk or officer, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate. Proof of previous conviction of a witness may be given if he denies it, etc.

(2) For such certificate a fee of $1 and no more may be demanded or taken. R. S. O. 1877, c. 62, s. 26. Fee.

20. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but in case the witness, in the opinion of the Judge, proves adverse, such party may contradict him by other evidence, or, by leave of the Judge, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement. R. S. O. 1877, c. 62, s. 27. How far a party may discredit his own witness.

PUBLIC AND OTHER DOCUMENTS.

Official Documents.

21. A copy of an Order in Council purporting to be made by the Lieutenant-Governor or Administrator of the Government of Ontario, and a copy of a departmental or other regulation purporting to be made by the said Lieutenant-Governor or Administrator in Council, or by any other person or persons authorized by law to make such regulation, purporting to be printed by the Queen's Printer at Toronto, and published with the Statutes of Ontario, shall be received in any Court as *prima facie* evidence of the tenor of the order or regulation. 48 V. c. 13, s. 9. Ontario Orders in Council, etc., printed by Queen's Printer and published with Statutes, to be *prima facie* evidence.

Dominion Orders in Council, etc., printed by Queen's Printer and published with Statutes, to be *prima facie* evidence.

22. A copy of an Order in Council purporting to be made by the Governor-General of Canada, or his deputy, or other Chief Executive Officer or Administrator of the Government of Canada, or a copy of a departmental or other regulation made by the said Governor-General or his deputy, or other Chief Executive Officer or Administrator of the Government of Canada, or by any other person or persons authorized by law to make such regulation, purporting to be printed by the Queen's Printer at Ottawa, and published with the Statutes of Canada by the said Queen's Printer, shall be received in any Court as *prima facie* evidence of the tenor of the order or regulation. 48 V. c. 13, s. 10.

How public or official documents proved.

23. In every case in which the original record could be received in evidence, a copy of any official or public document in this Province, purporting to be certified under the hand of the proper officer, or person in whose custody such official or public document is placed, or a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any corporation, created by charter or statute in this Province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer or secretary thereof, shall be receivable in evidence without proof of the seal of the corporation or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R. S. O. 1877, c. 62, s. 28.

Privilege in case of official documents.

24. Where documents are in the official possession, custody or power of a member of the Executive Council, or the head of a Department of the Public Service of this Province, if the deputy head or other officer of the Department has the documents in his personal possession, and is called as a witness, he shall be entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the Department, to object to produce the documents on the ground that they are privileged; and such objection may be taken by him in the same manner, and shall have the same effect, as if such member of the Executive Council or head of the Department were personally present and made the objection. 49 V. c. 16, s. 16.

Copies of public books or documents admissible in evidence.

25.—(1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other

statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any Court of justice, or before a person having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original has been entrusted.

(2) Such officer shall furnish such certified copy or extract to any person applying for the same at a reasonable time, upon his paying therefor a sum not exceeding ten cents for every folio of one hundred words. R. S. O. 1877. c. 62, s. 29.

Copies to be delivered if required.

Certain Statutes.

26. Any copy of the Statutes and Ordinances of the late Province of Lower Canada, printed and published by the printer duly authorized to print and publish the same by Her Majesty, or by any of Her Royal Predecessors, shall be received as conclusive evidence of the several Statutes made and enacted prior to the Union of the Provinces of Upper and Lower Canada by the Legislature of the Province of Lower Canada, and of the tenor of such Statutes and Ordinances, in any Court of civil jurisdiction in Ontario. R. S. O. 1877, c. 62, s. 37.

Copies of Acts of L. C., printed by Queen's Printer, to be conclusive evidence thereof.

[C. S. C. c. 5, s. 14 (1), *also enacts that a similar copy shall be conclusive evidence of such Statutes and Ordinances in Courts of criminal jurisdiction in Ontario.*]

Signatures of Judges.

27. All Courts, Judges, Justices, Masters, Clerks of Courts, Commissioners judicially acting, and other judicial officers in this Province, shall take judicial notice of the signature of any of the Judges of the Supreme Court of Canada, the Court of Appeal, the High Court of Justice, the County Courts of Ontario, or the Superior or Circuit Courts in Quebec, where such signature is appended or attached to any decree, order, certificate, affidavit, or judicial or official document. R. S. O. 1877, c. 62, s. 30.

Judicial notice to be taken of signatures of Judges, etc.

Foreign Judgments.

28. Any judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature in England or Ireland, or in any

Foreign judgments, etc., how proved.

of the Superior Courts of Law, Equity or Bankruptcy in Scotland, or in any Court of Record in any of the Provinces of Canada, or in any British Colony or Possession, or in any Court of Record of the United States or of any State of the United States of America, may be proved in any action or proceeding in Ontario, in which proof of such judgment, decree or judicial proceeding may be necessary or required, by an exemplification of the same under the seal of the Court, without any proof of the authenticity of such seal or other proof whatever, in the same manner as any judgment, decree or similar judicial proceeding of the High Court in Ontario may be proved by an exemplification thereof in any judicial or other proceeding in the said Court. R. S. O. 1877, c. 62, s. 31; 43 V. c. 7, s. 1.

Notarial Documents.

Notarial Acts in Quebec admissible.

29. A copy of a notarial act or instrument in writing made in Quebec, before a Notary, filed, enrolled or enregistered by such Notary, and certified by a Notary or Prothonotary to be a true copy of the original thereby certified to be in his possession as such Notary or Prothonotary, shall be receivable in evidence in any judicial or other proceeding in Ontario in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved. R. S. O. 1877, c. 62, s. 32.

How impeached.

30. Such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a Notary, or be filed, enrolled or enregistered by a Notary in Quebec. R. S. O. 1877, c. 62, s. 33.

Protests of Bills and Notes.

Protests *prima facie* evidence.

31. All protests of bills of exchange and promissory notes shall be received in all Courts as *prima facie* evidence of the allegations and facts therein contained. R. S. O. 1877, c. 62, s. 34.

Certificate of notaries to be *prima facie* evidence.

32. Any note, memorandum or certificate at any time made by one or more Notaries Public, either in Ontario or Quebec, in his own handwriting or signed by him at the foot of or embodied in any protest, or in a regular register of official acts kept by him, shall be *prima facie* evidence in Ontario of the fact of notice

of non-acceptance or non-payment of a promissory note or bill of exchange having been sent or delivered, at the time and in the manner stated in such note, certificate or memorandum. R. S. O. 1877, c. 62, s. 35.

Production of protest to be *prima facie* evidence that protest was made.

33. The production of a protest on a promissory note or bill of exchange, under the hand or seal of one or more Notaries Public, either in Ontario or Quebec, in any Court in Ontario, shall be *prima facie* evidence of the making of such protest. R. S. O. 1877, c. 62, s. 36.

Depositions.

Copies of depositions certified by persons taking the same admissible in evidence.

37. Where an examination of a party or witness has been taken before a Judge or other officer or person appointed to take the same, copies of the examinations and depositions, certified under the hand of the Judge, officer or other person taking the same, shall, without proof of the signature, be received and read in evidence, saving all just exceptions 42 V. c. 15, s. 3.

Proof of Wills.

In actions concerning real estate, probate, etc., to be *prima facie* evidence of will, etc., after certain notice, save where its validity is put in issue.

38. In any action where it is necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, the party intending to establish in proof the devise or other testamentary disposition may give notice to the opposite party ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the will or letters of administration with the will annexed, or a copy thereof, stamped with the seal of the Surrogate Court granting the same, or with the seal of the Court of Chancery, where the probate or letters of administration were granted by the former Court of Probate for Upper Canada; and in every such case the probate or letters of administration or copy thereof, respectively stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, under *The Surrogate Courts Act*, unless the party receiving the notice within four days after the receipt gives notice that he disputes the validity of the devise or other testamentary disposition. R. S. O. 1877, c. 62, s. 41. Rev. Stat. c. 50.

As to costs of proving a will in an action.

39. In every case in which in such action the original will is produced and proved, the Court or Judge before whom such evidence is given may direct by which of the parties the costs thereof shall be paid. R. S. O. 1877, c. 62, s. 42.

Proof in the case of will of real estate filed in Courts in other British possessions.

40. In case of the death of a person in any of Her Majesty's possessions out of Ontario, after having made a will sufficient to pass real estate in Ontario, and whereby such estate has been devised, charged or affected, and in case such will has been duly proved in any Court having the proof and issuing probate of wills in any of such possessions, and remains filed in such Court, then in case notice of the intention to use such probate or certificate in the place of the original will is given to the opposite party in such proceeding one month before the same is to be so used, the production of the probate of the will, or a certificate of the Judge, Registrar or Clerk of such Court, that the original is filed and remains in the Court, and purports to have been executed before two witnesses, shall, in any proceeding in any Court in Ontario concerning such real estate, be sufficient *prima facie* evidence of the will and the contents thereof, and of the same having been executed so as to pass real estate, without the production of the original will; but the probate or certificate shall not be used if, upon cause shewn before such Court, or a Judge thereof, the Court or Judge finds reason to doubt the sufficiency of the execution of the will to pass such real estate as aforesaid, and makes a rule or order disallowing the production of the probate. R. S. O. 1877, c. 62, s. 43.

Certificate to be *prima facie* evidence.

41. The production of the certificate, in the last preceding section mentioned, shall be sufficient *prima facie* evidence of the facts therein stated, and of the authority of the Judge, Registrar or Clerk, without proof of his appointment, authority or signature. R. S. O. 1877, c. 62, s. 44.

Copies of Registered Instruments.

Meaning of "instrument."

Rev. Stat. c. 114, s. 2.

42. The word "instrument" in the next succeeding three sections shall have the meaning assigned to the word "instrument" in section 2 of *The Registry Act*. R. S. O. 1877, c. 62, s. 47.

Registered instrument *prima facie* evidence.

43. An exemplification or a certified copy of any registered instrument or memorial, under the hand and seal of office of the Registrar in whose office the same

is registered, shall be received as *prima facie* evidence, in every Court in Ontario, of the original of the instrument or memorial, except in the cases provided for in section 45. R. S. O. 1877, c. 62, s. 45. *See also* cap. 114, s. 24

Instrument with certificate of registration *prima facie* evidence.

44. In case one of two or more original parts of any instrument is registered, the Registrar shall indorse upon each of such original parts a certificate of the registration in the form of Schedule G to *The Registry Act*, and such original so certified shall be received as *prima facie* evidence of the registration and of the due execution of the same. R. S. O. 1877, c. 111, s. 56.

Rev. Stat. c. 114.

Certified copies of registered instruments may be used instead of originals after notice.

45. In any action where it would be necessary to produce and prove an original instrument which has been registered in order to establish such instrument and the contents thereof, the party intending to prove such original instrument may give notice to the opposite party, ten days at least before the trial or other proceeding in which the said proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the original instrument, a copy thereof certified by the Registrar, under his hand and seal of office; and in every such case the copy so certified shall be sufficient evidence of the original instrument, and of its validity and contents, unless the party receiving the notice within four days after such receipt gives notice that he disputes the validity of the original instrument, in which case the costs of producing and proving the original may be ordered by the Court or Judge to be paid by any or either of the parties as may be deemed right. R. S. O. 1877, c. 62, s. 46.

Exception.

Costs in such cases.

Copies of Other Written Instruments.

Copies of certain documents may be admitted as evidence on certain conditions.

46.—(1) In any action or proceeding in the cases of telegrams, letters, shipping bills, bills of lading, delivery orders, receipts, accounts and other written instruments used in business and other transactions, where it is necessary to prove the original document, the party intending to prove the original may give notice to the opposite party, ten days at least before the trial or other proceeding in which the said proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the contents, an instrument purporting to be a copy of the document.

Proviso.

(2) Such copy may then be inspected by the opposite party at some convenient time and place; and in every such case the copy shall, without further proof, be sufficient evidence of the contents of the original document, and be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned therein for such inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the said trial or proceeding, and to require proof of the original; and the Court or Judge, before whom the question is raised, may direct by which of the parties the costs which may thereupon attend any production or proof of the original document, according to the rules of evidence heretofore existing, shall be paid. R. S. O. 1877, c. 62, s. 48.

MISCELLANEOUS PROVISIONS.

Evidence in actions wherein any person resident in Great Britain is a party.

48. In an action or other proceeding relating to any debt or account (other than an action by or on behalf of Her Majesty), wherein a person residing in Great Britain is a party, the evidence and examination of witnesses on behalf of either or any of the parties to the action or proceeding shall be the same, and given in the same manner, as in other actions or proceedings, according to the practice of the Court. 45 V. c. 10, s. 6.

Evidence in actions.

Rev. Stat. c. 112, s. 1.

49. It shall not be necessary in an action to produce any evidence which, by section 1 of *The Act to amend the Law of Vendor and Purchaser and to Simplify Titles*, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of such action. R. S. O. 1877, c. 62, s. 49.

Attesting witness need not be called where none was required by law.

50. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite: and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto. R. S. O. 1877, c. 62, s. 50.

Comparison of disputed writing with genuine.

51. Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. R. S. O. 1877, c. 62, s. 51.

52. Where a document is received in evidence by virtue of this Act, the Court, Judge, Commissioner or other person acting or officiating judicially, who admits the same, may direct the same to be impounded and kept in the custody of an officer of the Court, or other person, for such period and subject to such conditions as to the Court or person who admits the document seems meet, or until further order touching the same has been made either by such Court or by the Court to which the officer belongs, or by the person or persons who constituted such Court, or by some one of the Judges of the High Court or a County Court (as the case may be), on application made for that purpose. R. S. O. 1877, c. 62, s. 52.

When instruments offered in evidence may be impounded.

RULES OF SUPREME COURT OF JUDICATURE FOR ONTARIO RELATING TO EVIDENCE.

Examinations.

Part of examination to be evidence.

RULE 506.—Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite parties; provided always, that in such case the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence. J. A. Rule 239.

Subpœnas.

Subpœnas.

RULE 559.—All writs of subpœna may be tested, or may bear date upon the day when the same are issued. R. S. O. 1877, c. 62, s. 15.

Subpœna to produce original record not to issue without order.

RULE 560.—No subpœna for the production of an original record, or of an original memorial from any registry office, shall be issued unless the order of the Court or a Judge is produced to the officer issuing the same, and filed with him, and unless the writ is made conformable to the description of the document in such order. Rules T. T. 1856, 31.

Any number of names may be included in one subpœna.

RULE 561.—Any number of names may be included in one subpœna, and no more than one subpœna shall be allowed on taxation of costs, unless a sufficient reason be established to the satisfaction of the taxing officer for issuing more than one. Rules T. T. 1856, 163.

Calling opposite party.

RULE 562.—Wherever any party in any civil action desires to call the opposite party as a witness at the hearing or trial he shall either subpœna such party or give him or his solicitor at least eight days' notice of the intention to examine him as a witness in the cause; and if such party does not attend on such notice or

subpoena, such non-attendance shall be taken as an admission *pro confesso* against him in any such action, unless otherwise ordered by the Court or Judge in which or before whom such examination is pending, and a general finding or judgment may be had against the party thereon, or the plaintiff may be non-suited, or the proceedings in the action may be postponed by the Court or Judge, on such terms as the Court or Judge sees fit to impose. R. S. O. 1877, c. 62, s. 18.

Bench warrants.

RULE 563.—Upon proof to the satisfaction of the Judge presiding at the sittings of any Court of the service of a subpœna upon any witness who fails to attend or to remain in attendance in accordance with the requirements of the subpœna, and that a sufficient sum for his fees as a witness had been duly paid or tendered to him, and that the presence of such witness is material to the ends of justice, the said Judge may, by his warrant, directed to any sheriff or other officer of the Court, or to any constable, cause such witness to be apprehended and forthwith brought before him or any other Judge who may thereafter preside at such sittings, to give evidence; and in order to secure his presence as a witness, such witness may be taken on such warrant before the presiding Judge and detained in the custody of the person to whom the warrant is directed, or otherwise, as the presiding Judge may order, until his presence, as such witness, shall be required, or, in the discretion of the said Judge, he may be released on a recognizance (with or without sureties) conditioned for his appearance to give evidence.

Evidence at Trials, and References.

Evidence on trial to be *viva voce*.

RULE 564.—In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of an action or at an assessment of damages shall be examined *viva voce* and in open Court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined before an examiner; provided that where it appears to the Court or Judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced,

an order shall not be made authorizing the evidence of the witness to be given by affidavit. J. A. Rule 282.

Or before a Master.

RULE 565.—All witnesses in any matter pending before a Master, Local Master or Referee, shall give their testimony *viva voce*, and be subject to examination before the Master, unless it is otherwise ordered by the Master, or by the Court or a Judge, on special grounds, or with the consent of the parties in the suit or controversy to which the testimony relates. R. S. O. 1877, c. 40, s. 100.

Depositions.

RULE 566.—The Court or a Judge may, in any cause or matter where it appears necessary for the purposes of justice, make any order for the examination upon oath before an officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to the cause or matter to give such deposition in evidence therein, on such terms, if any, as the Court or Judge may direct. J. A. Rule 285.

Affidavits by consent, or by leave of the Court.

RULE 567.—At the trial of an action, or of any further directions therein, affidavits of particular witnesses, or affidavits as to particular facts and circumstances, may be used by consent, or by leave of the Court; and such consent may be given on behalf of persons under disability, with the approbation of the Court. Chy. O. 176.

When to be filed by plaintiff.

RULE 568.—In case the parties in any action consent to the evidence being taken by affidavit as between the plaintiff and the defendant, the plaintiff within fourteen days after such consent has been given, or within such time as the parties may agree upon, or a Judge in Chambers may allow, shall file his affidavits and deliver to the defendant or his solicitor a list thereof. J. A. Rule 301.

When to be filed by defendant.

RULE 569.—The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a Judge in Chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof. J. A. Rule 302.

Filing affidavits in reply.

RULE 570.—Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof. J. A. Rule 303.

Cross-examination on affidavit.

RULE 571.—Where the evidence is taken by affidavit any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production. J. A. Rule 304.

Compelling attendance of witness.

RULE 572.—The party to whom such notice as is mentioned in the last preceding Rule is given shall be entitled to compel the attendance of the deponent for cross-examination, in the same way as he might compel the attendance of a witness to be examined. J. A. Rule 305.

Libel or slander, particulars.

RULE 573.—In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the Judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence. Eng. R. 1883, 461. New.

Copies of depositions certified by persons taking the same admissible in evidence.

RULE 574.—Where an examination of any party or parties, witness or witnesses, has been taken before a Judge of the High Court, or of any County Court, or before any other officer or person appointed to take the same, copies of such examinations and depositions, certified under the hand of the Judge, officer or other person taking the same, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. 42 V. c. 15, s. 3.

Evidence of service of notice to produce.

RULE 575.—An affidavit of the solicitor in the cause, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of

such notice to produce, shall be sufficient evidence of the service of the notice, and of the time when it was served. R. S. O. 1877, c. 50, s. 173.

Evidence on Motions.

Evidence on motion or petition.

RULE 576.—Upon any motion or petition evidence may be given by affidavit.

Cross-examination on affidavits.

RULE 577.—Every person who makes an affidavit to be used in any action or proceeding shall be liable to cross-examination thereon, and may be required to attend in the same manner, and subject to the same rules, as a party to be examined in the cause.

Attendance of witnesses for examinations on motions, how procured.

RULE 578.—A party to any action or proceeding may, by a writ of subpœna *ad testificandum* or *duces tecum*, require the attendance of a witness to be examined before the Court, or before any officer having jurisdiction in the county where the witness resides, for the purpose of using his evidence upon any motion, petition or other proceeding before the Court, or any Judge or judicial officer in Chambers.

(*a*) The attendance of such witness is to be secured in the same manner and subject to the same rules as upon the examination of a party in the cause. J. A. Rule 598.

Court or Judge may, on hearing any motion or summons, order the production of documents or *viva voce* examinations.

And may make rule or order thereon.

RULE 579.—Upon the hearing of any motion before the High Court or a Judge the Court or Judge at discretion, and upon such terms as it or he thinks reasonable, may from time to time order to be produced such documents as it or he thinks fit, and may order such witnesses as it or he thinks necessary, to appear and be examined *viva voce* before such Court or Judge, or before a Judge of any County Court, or before any other person; and upon reading the report of the Judge of the County Court or other person, as the case may be, or if no such reference is made, then upon examining such documents or hearing such witnesses by the Court or Judge, the Court or Judge may make such order as seems just; and in cases within the jurisdiction of a County Court, the Court or a Judge therein having jurisdiction in the case may order the production of documents or the attendance of witnesses before such Court or Judge, or before the Clerk of such County Court, and upon hearing such evidence or reading the report of the Clerk may make such order as seems just, in like manner as if the proceedings were had in the High Court. R. S. O. 1877, c. 50, s. 175.

Power by order to compel attendance of witnesses or production of documents in such cases.

RULE 580.—The Court or Judge may, by the order, command the attendance of the witnesses named therein for the purpose of being examined, or may command the production of any writings or other documents, to be mentioned in the rule or order; and in the case of a Judge, he may, if necessary or convenient so to do, direct the attendance of the witness to be at his own place of abode or elsewhere. R. S. O. 1877, c. 50, s. 176.

Disobedience to be a contempt of Court.

RULE 581.—If, in addition to the service of the order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, is also served, together with or after the service of the order, the wilful disobedience of the order shall be a contempt of Court, and proceedings may be forthwith had by attachment. But (1) every person whose attendance is so required shall be entitled to the like payment for attendance and expenses as if he had been subpœnaed to attend upon a trial; (2) no person shall be compelled to produce, under any such rule or order, any writing or other document which he would not be compellable to produce at the trial of the cause; (3) the Court or Judge, or person appointed to take the examination, may adjourn the same from time to time as occasion may require. R. S. O. 1877, c. 50, s. 177.

Witnesses to be paid expenses.

What documents need not be produced.

Examinations may be adjourned.

How prisoners may be brought to give evidence.

RULE 582.—The Sheriff, gaoler or other officer having the custody of any prisoner, shall take the prisoner for any examination authorized by these Rules, when so directed by an order of the Court or Judge, which order may be issued by the Court or Judge under such circumstances as appear to warrant the production of the prisoner. R. S. O. 1877, c. 50, s. 178.

Certified copies of proceedings may be obtained from the office where filed.

RULE 583.—Wherever any party wishes to produce to the Court or a Judge the writ or any pleading, or other proceeding filed in any office of the Court, he may demand and receive from the officer in whose office the writ, pleading or other proceeding is, a copy of the same, certified by the officer to be a true copy of the original; and the copy so certified shall be admissible in evidence in all causes and matters, and between all persons and parties, to the same extent as the originals would be admissible.

Default in pay-

RULE 584.—Where default is made in the payment

ment, how to be proved.

of money appointed to be paid into a bank, the certificate of the cashier, manager or agent of the like bank where the same is made payable, or of the like bank officer, shall be sufficient evidence of default. Where the affidavit of the party entitled to receive the same is by the present practice required, the same shall still be necessary. Chy. O. 257.

Power given to High Court to receive further evidence in all appeals, etc.

RULE 585.—In all appeals, either to the Court of Appeal or the High Court or a Judge, and on all motions to set aside or vary verdicts or judgments or hearings in the nature of appeals, the Court or Judge appealed to shall have all the powers and duties as to amendment and otherwise of the Court, Judge or officer appealed from, together with full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination before the Court or Judge appealed to, or by affidavit, or by depositions taken before a special examiner or commissioner.

(2) Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment upon the merits at the trial or hearing of any action or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without the special leave of the Court. 41 V. c. 8. s. 7. R. S. O. 1877, c. 38, s. 22.

Admissions.

Notice to admit documents.

RULE 617.—Either party may call upon the other party to admit any document, saving all just exceptions. J. A. Rule 241.

Proof of admissions.

RULE 619.—The production of any written admissions purporting to be admissions in the action, and to be made in pursuance of any notice to admit documents or otherwise, and to be signed by the solicitor of the party by whom, or on whose behalf, they purport to be made, shall be sufficient *prima facie* evidence of such admissions. J. A. Rule 243.

TRIAL.

Non-appearance of defendant.

RULE 672.—If, when an action is called on for trial, the plaintiff appears, and the defendant does

not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him. J. A. Rule 268.

Non-appearance of plaintiff.

RULE 673.—If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action; but if he has a counter-claim he may prove such claim so far as the burden of proof lies upon him. J. A. Rule 269.

Witnesses may be put out of Court.

RULE 674.—The Judge at the trial shall, at the request of either party, cause the witnesses to be moved from the Court during the trial, and also the parties to the suit tendering themselves as witnesses, if the Judge deems necessary; or he may instead require the party intending to give evidence for himself to be examined before his other witnesses; and any such witness who returns to the Court without leave shall be liable to be punished in such manner as to the said Judge may seem proper; and the Judge may, in his discretion, exclude the testimony of any witness who returns to the Court without leave of the Judge. R. S. O. 1877, c. 50, s. 260.

How addresses of counsel to jury regulated.

RULE 675.—At the trial the addresses to the jury shall be regulated as follows:—The party who begins, or his counsel, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, shall be allowed to address the jury a second time at the close of the case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall then be allowed to open his case, and also to sum up the evidence (if any) The right to reply shall be the same as at present. R. S. O. 1877, c. 50, s. 261.

Evidence omitted by accident or mistake, how supplied.

RULE 676.—Where, through accident or mistake or other cause, a party omits or fails to prove some fact material to his case, the Judge may proceed with the trial, subject to such fact being afterwards proved at such time, and subject to such terms and conditions as to costs and otherwise, as the Judge shall direct; and, if the case is being tried by a jury, the Judge may direct the jury to find a verdict as if such fact had been proved, and the verdict shall take effect on such fact being afterwards proved as directed; and if not so proved, judgment is to be entered for the

opposite party unless the Court or a Judge otherwise directs. This Rule shall not apply to an action for libel. J. A. Rule 271.

Trial of equitable issues.

RULE 677.—Where, in any action, equitable issues are raised by the pleadings, they shall be heard and tried, and the assessment or inquiry of damages, if any, incidental thereto shall be assessed and inquired of by the Court or a Judge without the intervention of a jury; but it shall be competent for the Court or Judge, upon the application of either party, supported by sufficient reasons, to order such issues to be tried or damages assessed by a jury. R. S. O. 1877, c. 50, s. 257.

Legal and equitable issues.

RULE 678.—Where, in any action or other proceeding at law, both legal and equitable issues are raised, such issues shall be tried at the same time, unless the Court or a Judge, or the Judge presiding at the trial, otherwise directs. R. S. O. 1877, c. 50, s. 258.

Costs of protest recoverable.

RULE 679.—In an action brought to recover the amount of any bill, draft, order or promissory note, and the damages and interest, the expenses of noting and protesting, and all other charges and postages incurred thereon, it shall not be necessary to specially claim such damages, interest, expenses and charges, but the same shall be allowed to the plaintiff at any trial, assessment of damages or reference, as if the same had been specially claimed. R. S. O. 1877, c. 50, s. 144.

Assessment of damages.

RULE 680.—Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment. Eng. R. 1883, 482.

Adjournment of trial.

RULE 681.—The Judge, if he thinks it expedient for the interest of justice, may postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit. J. A. Rule 272.

Judge may direct entry of judgment; or reserve judgment.

RULE 682.—Upon the trial of an action the Judge may, at or after the trial, direct that judgment be signed and entered for any or either party, or adjourn the case for further consideration. J. A. Rule 273.

Exhibits at trial, how to be marked.

RULE 683.—Exhibits put in at the trial are to be marked thus:—"In the High Court of Justice—Div. [*short title*]. This exhibit (the property of) is produced by the plaintiff (*or* defendant C., *as the*

case may be), this day of 18 . A. B." (*Registrar, Deputy Clerk, Deputy or Local Registrar*). Chy. O. 177.

Evidence, oral or documentary, cannot be withdrawn without leave.

RULE 684.—Where a party or witness is examined at the trial, or a document is put in as evidence and marked by the Registrar, Deputy Clerk, Deputy or Local Registrar, the deposition of the party, or witness so examined, or the document so put in, is not to be withdrawn as evidence without the leave of the Court. Chy. O. 178.

Where judgment reserved; exhibits to be left with Registrar, etc.

RULE 685.—Where judgment is reserved the exhibits used at the trial shall be deposited with the Registrar, Deputy Clerk, Deputy or Local Registrar, for the use of the Court, and shall not be delivered out without order or consent of parties. See Chy. O. 179.

When action cannot proceed in consequence of absence of solicitor, he may be ordered to pay costs.

RULE 686.—Where, upon the trial of an action, it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally or by some person in his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which according to its practice ought to have been delivered, such solicitor shall personally pay to the parties such costs as the Court thinks fit to award. Chy. O. 182.

By whom entries of findings to be made.

RULE 687.—The Registrar, Clerk of Assize or other officer present at the trial shall enter all such findings of fact as the Judge may at the trial direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge, such entry to be made in a book to be kept for the purpose, and also to be indorsed on the Record. J. A. Rule 274.

Certificate of Judge or officer.

RULE 688.—The said indorsement, or the certificate of the said officer or the certificate of the Judge, shall be a sufficient authority to the proper officer for signing judgments to sign judgment accordingly. J. A. Rule 275.

When and how Deputy Clerks shall deliver record or exhibits to attorney or parties.

RULE 689.—The Registrar, Clerk of Assize or other officer present at the trial shall, after judgment has been given, or, in jury cases, after the time for the moving for a new trial has expired, deliver to the solicitor of the party entitled thereto any record in their custody upon getting a receipt for the same. R. S. O. 1877, c. 50, s. 280.

COSTS.

Costs of not admitting.

RULE 1189.—When anything in the course of an action or reference which ought to have been admitted has not been admitted, the party who neglected or refused to make the admission may be ordered to pay the costs occasioned by his neglect or refusal. See Chy. O. 234. J. A. Rule 163.

Notice to admit.

RULE 1190.—No costs of proving a document shall be allowed unless a notice to admit has been given under Rule 617, except when the omission to give the noticeis a saving of expense.

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